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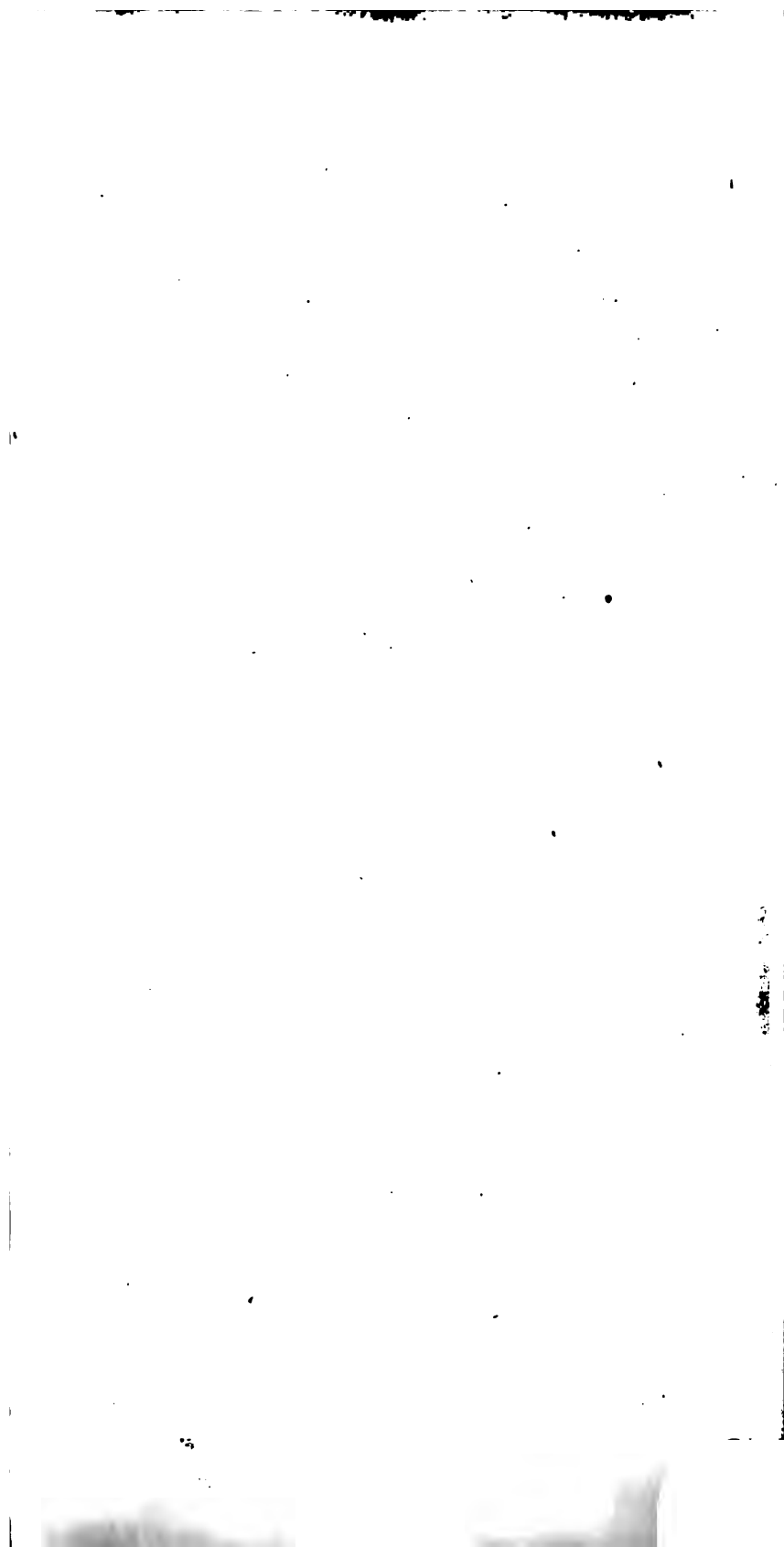
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

District Court of the United States

FOR THE

SOUTHERN DISTRICT OF NEW-YORK.

BY SAMUEL BLATCHFORD AND FRANCIS HOWLAND,

COUNSELLORS AT LAW.

VOLUME I.

New-York:

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1855.

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PREFACE.

It has long been a source of regret among the members of the legal profession, that there were no Reports of cases, particularly of Admiralty cases, adjudged in the District Court of the United States for the Southern District of New-York, other than such as were to be found scattered here and there in legal periodicals. The variety and importance of the cases decided in that Court, within whose jurisdiction is found the chief commercial city of the Union, and the long experience and high juridical attainments of the distinguished Judge who, for nearly thirty years, has presided there, have seemed to warrant the preparation of formal Reports of some of the cases determined in that Court. The present volume embraces a selection of Cases in Admiralty, fifty-three in number, running through a period of nearly ten years. It is intended to publish other volumes containing cases down to the present time.

There is an apparent anachronism in citing the laws of the United States from Little & Brown's edition of the *United States Statutes at Large*. But this has been done, because that edition is a standard publication recognised by act of Congress, and has superseded, in most libraries, all earlier editions. In some instances, too, the Rules of Court referred to are cited by their numbers in the Rules now in force, as those in force at the dates of the decisions are entirely out of print, and the same Rules differ in their numbers in the two sets of Rules.

NEW-YORK, December 1st, 1855.

92065

The Honorable SAMUEL R. BETTS was appointed District Judge of the United States for the Southern District of New-York, on the 21st day of December, 1826, in the place of the Honorable WILLIAM P. VAN NESS, deceased.

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ERRATA.

Page 94, line 22, in the head note to *The Trial*, for "wavier," read
"waiver."

Page 220, line 17, for "*hypotherarious*" read "*hypothecarious*."

CASES IN ADMIRALTY.

THE AMERICAN INSURANCE COMPANY AND OTHERS

vs.

CHARLES JOHNSON.

Parties whose interests rest upon a cause of action common to all, may unite in the same libel in Admiralty, though as between themselves their interests are separate and distinct.

A libel *in personam*, resting upon a common cause of action, may be filed for the libellants and for all others interested, whenever the whole subject matter can be disposed of in one suit.

A libel may be amended on motion by striking out unnecessary and impertinent allegations.

Admiralty Courts have jurisdiction equally *in personam* and *in rem*.

When Admiralty jurisdiction has once attached, it is not divested by reason of any further acts done upon land in continuation of the maritime act which gave jurisdiction.

Admiralty jurisdiction, when administered under the restrictions of the English jurisprudence, is co-extensive with the ebbing and flowing of the tide.

The test of Admiralty jurisdiction is whether the transaction is of a maritime character.

A party deprived of his property on the high seas in any manner has, as a general principle, his remedy in Admiralty.

Where money is paid by the owner of property to the purchaser of it under an unauthorized sale to satisfy a claim against it for salvage, if it is paid for the purpose of recovering possession of the property, and with an express reservation of all rights, the owner is not prevented from maintaining an action against the salvor founded upon the wrongful sale.

The salvor in such case, if he has not been guilty of an intentional tort, is liable only to the extent of the salvage received by him.

A salvor forfeits all claim to salvage by neglecting to inform the salvaged vessel beforehand of an imminent and secret danger known to him, and against which he is able to warn her.

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But he may be entitled to a compensation for services performed, although his conduct has been such as to forfeit all claims to a salvage remuneration. Testimony taken *ex parte* is to be received with the greatest caution.

September 15th, 1827.

THIS was a libel *in personam*, in behalf of ten Marine Insurance Companies of the City of New-York. The libellants were underwriters upon the cargo of the brig Hercules, by twenty-eight several policies, to the amount of \$151,875, for a voyage from New-York to Mobile. The brig sailed with a cargo valued at \$180,000, and, in September, 1825, grounded on Carysfort reef on the coast of Florida. The respondent, who was master of a wrecking schooner, saw the Hercules the day before she grounded. At the time the two vessels came in sight of each other the wind was N. E., the schooner standing S. W. by S., on a direct course to Key West, and the brig about S. S. E. The schooner was to the windward, and passed the brig the same day. The vessels were about two miles apart. There was evidence to show that the respondent believed the brig to be in danger of running ashore, but it did not clearly appear whether it would have been practicable for him to approach near enough to warn her of her danger, the seamen of the two vessels, who were the witnesses, varying in their representations on this point, according to their situations and apparent prepossessions. No attempt was made on the part of the schooner to approach the brig, or to give her any notice, or to put her on her guard. After the accident, the respondent, with two wrecking vessels, came to the rescue of the brig, and got her off the reef. The brig was thought to be in a good deal of peril, and the respondent took possession of her at the request of her

master. After depositing a large part of her cargo in the two wrecking vessels, the respondent navigated the brig to Key West. Seaman, the master of the brig, did not at first show any unwillingness to go there, though, after the brig had started, he requested the respondent to proceed to Mobile, her port of destination; but the respondent, who had shown a strong preference for Key West from the first, resolved to take her there.

Proceedings to obtain salvage were instituted by the respondent in the Territorial Court of Florida, which awarded $31\frac{1}{4}$ per cent. of the value of the brig and her cargo, and, under the decree of the Court, the vessel was sold at auction at Key West for \$1,531 12, and the cargo for \$77,853. The salvage money was finally adjusted at \$25,006 27. The respondent purchased property at the sale to the amount of \$9,046. The master of the brig was examined as a witness in the Florida Court, but did not acquiesce in the award of salvage, and attempted, without success, to enter a formal protest against the sale of the vessel and cargo. Although the property was sold at a sacrifice, it did not appear that the sale was fraudulent, or that the respondent was guilty of any bad faith. The greater number of the purchasers who attended the sale were from Havana and Matanzas.

The owners of the cargo abandoned it to the libellants, who sent one Earle, as an agent, to Key West. He found, on his arrival there, that the brig and her cargo were already sold. The nearest Court then in session was held at St. Augustine, and, before he could have gone there and returned, the goods would have been taken beyond its jurisdiction. Under these cir-

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cumstances, he offered \$72,500 to recover possession of the brig and her cargo from their respective purchasers, but with an express reservation of all his rights, and with the open assertion that he ransomed the goods as if from pirates. The \$72,500 was finally given to one Whitehead, a member of the firm of Greene & Co., which had sold the brig and cargo at auction; and that firm agreed, for that sum, to recover back the brig and her cargo, and return them to Earle. This was done. The libel prayed that the salvage money be refunded, and that the \$72,500 paid to the respondent and his associates to redeem the vessel be decreed to the libellants, with costs and damages.

The respondent filed a plea to the jurisdiction of the Court, setting forth that the Territorial government of Florida had authority to pass any laws not inconsistent with the laws and Constitution of the United States, and that, on the 4th of July, 1823, they passed an act entitled "An act concerning wreckers and wrecked property," prescribing certain formalities, according to which the brig and her cargo had been sold, as would appear by a copy of the record of the Territorial Court of Florida. To this plea the libellants demurred. In March, 1826, this Court (VAN NESS, District Judge) gave judgment for the libellants upon the demurrer, with leave to the respondent to answer over. The grounds of the decision were, that all cases of Admiralty and maritime jurisdiction were, by the 9th section of the judiciary act of September 24th, 1789, (1 *U. S. Stat. at Large*, 76,) originally cognizable in the United States District Courts exclusively; that salvage was a case of Admiralty and maritime jurisdiction; that the United States District Courts had exclusive original cognizance

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of a case of salvage, unless Congress had conferred jurisdiction on some other tribunal; that Congress had not granted to the Legislative Council of Florida authority to establish a Court with jurisdiction over cases of salvage on the high seas; and that such a Court was unconstitutional and its acts were void.*

After his plea was overruled, the respondent answered to the merits, and incorporated in his answer the substance of the plea. The cause was then heard upon

* Upon the question raised by the plea to the jurisdiction, the opinion of this Court was, that the Legislative Council of Florida did not intend, by the act of July 4th, 1823, to confer upon the Courts of Florida any other powers or duties than those of common law Courts; that the words *wrecked property*, in that act, were to be understood of wrecks at common law, namely, goods cast or left upon the land by the sea, (*Sir H. Constable's Case*, 5 Co. 107; *Jacobsen's Sea Lanes*, 540; *Respublica v. Lacaze*, 2 Dall. 122,) of which the English common law Courts had jurisdiction; that the act was not intended to confer jurisdiction over cases of salvage upon the high seas; and that if it were so intended, the Legislative Council of Florida had no constitutional authority to confer such jurisdiction. The case of *The American Insurance Company v. Canter*, which arose about the same time in the District of South Carolina, presented the same question, and was decided in the same way, but was carried by appeal to the Circuit Court, and finally to the Supreme Court of the United States, (1 Pet. 511,) where the decision of the Circuit Court reversing that of the District Court was affirmed, and the point was settled, that though Admiralty jurisdiction in the States could be originally exercised only by the District Courts of the United States, yet the same limitation did not extend to the Territories; that in legislating for them, Congress exercised the combined powers of the general and State governments, and that the act of the Territorial Legislature of Florida, erecting a Court which proceeded under the provisions of the law to award salvage and to decree the sale of the cargo of a vessel which had been stranded, and which cargo had been brought within the Territorial limits, was not inconsistent with the Constitution and laws of the United States, and was valid. The opinion of this Court upon the point raised by the plea in this case is therefore omitted.

On the 1st of February, 1826, about four months after the decree of the Territorial Court awarding salvage to the respondent, the act of the Legislative Council of Florida of July 4th, 1823, was annulled by an act of Congress, (4 U. S. Stat. at Large, 138,) and, on the 23d of May, 1828, an act was passed by Congress to establish a Southern judicial district in the Territory of Florida. (*Id.* 291.)

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pleadings and proofs. The evidence consisted mostly of depositions taken before a Commissioner, though the same witnesses were in some instances examined both before the Commissioner and in Court. The opinion of the Court supplies all the facts necessary to an understanding of the case.

Beverly Robinson and *William Slosson*, for the libellants.

Robert Tillotson and *Seth P. Staples*, for the respondent.

BETTS, J.—There are three objections raised upon matters of form to the libellants' recovery, which it may be well to consider before proceeding to the merits of the case.

It is insisted, first, that the libellants show no joint interest or common cause of action which entitles them to unite in this action. Points of practice and forms of pleading have for ages formed the most perplexing and entangled subjects of litigation in the jurisprudence we have adopted in this country. Those Courts which derive their rules of procedure from the civil law have been generally supposed to be most free from this difficulty. Yet, on the other hand, it is imputed to them that they are destitute of any distinct principles in this behalf, which may serve to insure uniformity in their procedure, or to modify the mere discretion which Courts may be prone to apply in dictating for each case the law deemed most fit for it. It has been adjudged that in certain branches of the practice of a Court of Admiralty, the technical niceties of

the common law are not to be regarded. (*The Merino*, 9 Wheat. 391; *The Samuel*, 1 Wheat. 9; *Locke v. The United States*, 7 Cranch, 339.) And there might probably be no incongruity in applying that doctrine to the whole extent of the jurisdiction of the Court. The Supreme Court has decided that in cases of *information* in a Court of Admiralty, it is enough to set out the offence so as to bring it within the statute upon which the information is founded, and to give notice to the opposite party of the charge he is called upon to answer. This is, unquestionably, the true spirit of all pleadings; and it will not be denied that there is a higher philosophy in it than there is in determining the sufficiency of a pleading by merely ascertaining its conformity to some formula which was contrived for general application, and not framed with a view to the facts or circumstances to be actually brought before the Court. Still it leaves much to discretion, and the justness with which the principle may be carried out in practice, will depend upon the competency of the magistrate who is called upon to administer it.

It does not belong to the functions of this Court to enact a system for the correction of such supposed defects. Its province is to inquire whether there are any determinate rules established which regulate the matter. If there are none, its duty is to bring the case within the analogy of such as are most consonant to the principles regulating the course of Courts of maritime jurisdiction. A research into the sources of the practice of this Court affords very little light on the subject. From its earliest history, the business of the Court seems to have proceeded in about one course. But when the authority for employing certain branches

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of practice is sought for, none other is discoverable than that the Court at some early day began to employ them; and ever after, on a recurrence of like circumstances in a suit, it was probably found more convenient to apply the means before used than to establish methods by positive appointment. This may be sufficient to create or sanction those uses; yet it is not accompanied by what ordinarily attends the growth of a rule of pleading or practice in other Courts—the adjudication of the Court upon the point, declaring or confirming the reasons for its introduction or continuance.

The civil jurisdiction of the Admiralty is generally held to be according to the forms of the civil law, by which is understood, in the United States and England, the positive law of the Romans, exhibited in the compilations of Justinian, and not, as on the continent of Europe, the modern private laws of the various nations which adopted the Roman law. Its course of proceeding in the United States was originally appointed to be conformable to the same law, (*Act of September 29th, 1789, 1 U. S. Stat. at Large, 93,*) and is remarkable for comprehension, brevity, celerity and simplicity. (1 *Kent's Comm.* 380.) In relation to the point now under consideration, the method of drawing out the written pleadings, the civil law would supply us no satisfactory assistance. At various periods of the Roman jurisprudence, formalities and ceremonies abounded in the institution of actions and in the methods of conducting them, and a scrupulous observance of verbal niceties in the frame of process was exacted. (*Quintil. de Oratore, 3, 8.*) So, also, each proceeding in the cause was taken with an accompani-

ment of symbols and fixed phrases. (4 *Gibb. Decline and Fall*, ch. 44; *Bever's Roman Laws*, b. 2, ch. 4.) Primarily, the manner of instituting a cause was of the most rude and abrupt character. The plaintiff himself took the defendant, without warrant or precept, before the Prætor, *oblato collo*, (by the collar,) and the proceedings there seem to have been conducted *ore tenus* by the parties, in short assertions and replies, very like the ancient method of pleading reported in the Year Books. (*Adams' Rom. Antiq.* 193.) And, as a remnant of such usages, *viva voce* libels are yet admissible in summary causes in the Ecclesiastical Courts, the processes of the Canon Courts being derivatives from the civil law. (*Clerke's Adm. Praxis*, tit. 19; *Cockburn's Ecc. Prax.* ch. 5; 1 *Hall's Law Journal*, 83.) In process of time, the allegations or demands of the actor were presented in writing, in what was termed *libellus*, or *libellus supplex*. (*Gibb. Forum. Roman.* 23; 2 *Browne's Civ. Law*, ed. 1799, 26; *Adams' Rom. Antiq.* 220; *Cockburn's Ecc. Prax.* app. 59; 1 *Hall's Law Journal*, 81; *Consett's Eccl. Prax.* pt. 3, ch. 1, § 1.) It does not appear to have been a subject of specific regulation in the civil law, (or in the French practice, which is closely modelled upon it,) as to what interests might be prosecuted jointly, or how far relief was restricted to the special manner in which the case was charged or articulated. The allegations of the parties might be expanded through a series of pleadings, *sponsio*, *replicatio*, *duplicatio*, *triplicatio*, etc., (*Livy*, b. 39; *Cicero in Verr.*; *Id. in Cocc.*;) yet the constituents of each particular pleading are not clearly defined by the books. (*Spence's Origin of Laws*; *Sevigné's History of Roman Law*; 4 *Gibb. Decline and*

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Fall, ch. 44.) The reasonable presumption, however, is, that these counter allegations were designed to maintain the controversy upon the allegations first propounded, and were not employed to determine the scope of the action or the competency of the actors to it. The libel was not required to correspond exactly with the demand put forth by the actor, either as to amount, time, place or thing. (*Justin. Inst. b. 4, tit. 6.*) The only qualities apparently prescribed by the text of the law were, that the libel should state the complaint with distinctness, certainty and aptness, with a proper conclusion or prayer, and without being contradictory to itself. (*Wood's Inst. of Civil Law, b. 4, ch. 3, § 3.*) This was no doubt the substance of the action given by the Prætor, whether one for which a precedent was found, or one devised for the particular case. (*Inst. b. 4, tit. 6; Dig. b. 2, tit. 13, § 1; Heinecc. Syntag. 673; 2 Browne's Civ. and Adm. Law, 349, 350.*) Whatever, then, might be comprehended within the action, might be properly made part of the complaint in the libel, and no interdiction to pleading in one action a right common to several parties, appears to have been made in the edicts or expositions of the laws.

Clerke and Browne consider the practice of the Ecclesiastical Courts in England to be the source from which that of the Admiralty Courts is drawn, and upon which it relies for authority. (*Clerke's Adm. Praxis, tit. 19; 2 Browne's Civ. Law, ed. 1799, 149.*) This only removes the inquiry one step further, without affording a solution of the difficulty presented. For the Ecclesiastical law of England was modeled from the canon law, and, in all defective or doubtful

cases, recourse was had to the body of the pontifical canon law for authority and guidance. (4 *Reeves' Hist. Eng. Law*, chs. 24 and 25.) And then, again, proceedings in the Courts of canon and civil law were considered identical. (*Bac. Ab. Eccles. Courts*, E.)

It accordingly still remains to determine what the original rule—that of the civil law—was. Baron Gilbert regards a libel under the civil law, and a bill in the Court of Chancery, to have been the same in their structure. (*Gilb. For. Rom.* 44.) In early practice, the bill in Chancery was merely a petition to the Chancellor, narrating the petitioner's case, and asking redress, without respect to form. (*Wyatt's Prac. Reg.* 57; *Wood's Inst. of Civil Law*, b. 4, ch. 3, § 3.) Though subsequent practice has amplified and affected to give great formality to bills in Chancery, yet they still retain the substance of the libel employed in the canon Courts. (*Barton's Suit in Equity*, 19, 26.) From the Chancery Court having been, for many ages, under the presidency of ecclesiastics, with whom the canon law was a rule both of conduct and of faith, it was natural that the proceedings of the one *forum* should be, as they proved in practice, common to both. We might, therefore, reason with tolerable directness, from the principles known to have been introduced into the Court of Chancery in respect to pleadings, as to what those principles were as then understood in the civil law. Yet we must be careful to discriminate between the practice and pleadings as known in the Court of Chancery during the early period of its history, and that which has grown up since the days of Lord Bacon and Lord Nottingham. The canon law only required in the libel a plain narrative of facts. (2 *Browne's Civ.*

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Law, ed. 1799, 79.) Reeves says it must contain the thing in question, with the quality of the action. (4 *Reeves' Hist. Eng. Law*, 14.) The Ecclesiastical Courts in England require the libel to be clear and explicit. (1 *Hall's Law Journal*, 81; 2 *Browne's Civ. Law*, ed. 1799, 101, 102.) Consett says, that in the plenary proceedings the plaintiff's claim is set forth *simply*, in a continued speech or oration; or *articulate*, in which the merits of the cause are propounded by articles. (*Consett's Eccl. Prax.* 402.) The choice of these varieties seem to have been left wholly to the pleader. When the libel was obscure, uncertain, confused or preposterous, and exception was taken to it for such causes, the most liberal practice in respect to amendments prevailed. (*Consett's Eccl. Prax.* pt. 3, ch. 1, § 2.) And they were commonly made *instantly*, at the suggestion of the excepting party. (*Cockburn's Eccl. Prax.* ch. 5, § 4.) And, though numerous provisions are made by the civil law for various defences against what are held to be, *prima facie*, efficacious actions, yet the defences relate in no case to matters of form. No system of rules seems ever to have been designed in the civil law, like those established by the common law, to destroy the plaintiff's action because he had framed or managed it inaptly. (*Just. Inst. lib.* 4, tit. 13; *Pandects*, lib. 44, tits. 1, 2.) Such, also, seems to be the case in the French Courts, whose practice has been conformed with great exactness to that of the civil law. (13 *Pothier's Works*.) So far, therefore, as the pleadings in a cause were subject to regulation under the civil law, it would appear that little more than simplicity and perspicuity in their structure were required. It was sufficient if they plainly informed the Court and

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the opposite party of the object sought, though they might be destitute of that technical fulness or unity of object which was exacted by the common law, and which has, in later times, grown into use in the Court of Chancery. None but substantial defects were regarded; and, if no exception was taken to the sufficiency of a pleading, an amendment was permitted at any time time before final sentence; and, when an exception was formally taken, the amendment might be made at any time before contestation of suit, (*Consett's Eccl. Prax. pt. 3.*) and at any time before sentence was pronounced, if the defendant had not previously excepted to the defects. (*Id. pt. 3, § 2.*)

The objections raised upon the defectiveness of the libel in the present case, were offered at the hearing of the cause after the proofs were all taken. They are said, however, to be in time, because they arise out of the testimony, the allegations of the libel importing that the libellants have a joint interest in the whole subject, while the proof shows that their interests are entirely distinct. I do not think the libel bears the interpretation put upon it by the respondent's counsel. In the introductory part it does, indeed, assert "that the libellants, by twenty-eight several policies, became underwriters upon the cargo of the brig Hercules." This language might perhaps indifferently bear the construction that each libellant subscribed all the policies, or that, the policies being several, they were so both in respect to the portions of cargo insured and to the parties underwriting. But the libel is made sufficiently distinct in this respect by the subsequent allegation, that the parcels were broken open at Key West, and the marks so defaced and altered that the libellants

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“were unable to identify the several parts and parcels thereof by them respectively insured as aforesaid.” This denotes that the libellants were not joint insurers.

If any advantage could legally be taken of this want of joint interest, the respondent should have interposed the proper exception. But I do not think the fact of any importance, however it is brought to the notice of the Court. The canon law permitted several actions to be joined in the same libel. (2 *Browne's Civ. Law*, ed. 1799, 79.) And our own Courts sustain libels uniting the most dissimilar interests. In *The Amiable Nancy*, the libel was filed by the owners of the vessel, the master, the supercargo and a mariner, for trespass to the vessel, and for an assault and battery on some of the libellants. Damages were awarded by this Court for each of those causes of action, and its decision was sustained, on appeal, by the Circuit Court and by the Supreme Court. (1 *Paine's C. C. R.* 111; 3 *Wheat.* 546.) The practice of the Court of Chancery permits suitors who have a like interest in the subject matter to unite in a bill, though they are not to participate with each other in the recovery. (*Lloyd v. Loaring*, 6 *Ves.* 773; *Adair v. The New River Co.* 11 *Ves.* 429; *Good v. Blewitt*, 13 *Ves.* 397; *Mitf. Pl. Amer.* ed. 1816, 135, *et seq.*) There is a manifest fitness and convenience in allowing parties in Admiralty suits to join as libellants, whose interests rest upon a cause of action common to all, though as between themselves their interests are separate and distinct, and I find no rule or principle of the civil law interdicting such junction.

This libel, however, should be amended so as to state that the cause is prosecuted for the libellants and for all others interested who may come in and establish

their rights in the subject matter. One action is enough to determine the right of the respondent in respect to the vessel and her cargo ; and the judgment should be so far final as to protect him from any further proceedings in relation thereto. This would be so if the suit were *in rem* ; and actions *in personam* and actions *in rem* being co-ordinate, and resting upon like principles in a Court of Admiralty, ought to be attended with the same result in this respect.

The second objection taken by the respondent is, that the libel is only adapted to a case of force or fraud, and that as neither of these is proved, no remedy can be had *secundum allegata* for a mere illegal privation of property. It is true that the libel admits of this exception. The brig was put in possession of the respondent by her master, both for the purpose of immediate relief from her peril, and to be afterwards piloted out of the reefs and into port. She was at that time in great danger, and required immediate assistance. Nor was there any force or fraud in conveying her to Key West. The testimony of Seaman, her master, though much more clear and explicit as taken before the Commissioner than as given in Court, yet in both cases agrees in this, that he did not urge the respondent to take the vessel to Mobile until she had got under weigh. The respondent was under no obligation to take her to her port of destination, there being an intermediate American port to which she could go with but slight interruption of her voyage. Neither is the respondent made a trespasser from the beginning by reason of any misconduct of his in Key West, or by his invoking the authority of the local Court there. The allegations of the libel, which charge the re-

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spondent with obtaining possession of the brig by force or fraud, cannot be supported. But I attach no importance to these allegations. They may be treated as surplusage or as matter of aggravation, and the libellants are at liberty to strike them out, if they shall be so advised. The Court proceeds upon the whole case as it is made out, without regard to what the libellants have denominated it, as in Admiralty practice there is no discriminating appellation of actions. The remedy is upon the case made, and not in conformity to any nomenclature of the action.

I perceive nothing in the cases cited or in the argument urged, to support the third objection, namely, that this proceeding cannot be sustained *in personam*, but only *in rem* against the brig and her cargo to reclaim them in kind. There is no doubt of the power of the Court to proceed with like authority *in personam* as *in rem*, where the subject matter is within its jurisdiction. Blackstone admits that the first process in Admiralty is frequently by arrest of the person. (3 *Black. Comm.* 108; *Smart v. Wolff*, 3 *T. R.* 323; 330.) This concession is fortified by the whole tenor of the practice of the Court, and of decisions here and in England. (*Clerke's Praxis*, by Hall; *Brevoor v. The Fair American*, 1 *Peters' Adm. Dec.* 87, 94.) There is no reason for requiring a different form of libel in respect to parties or causes of action in the one case from what is proper in the other. The seizure of the article and the monition consequent upon that, is equivalent to an arrest of the person, and was probably introduced as a substitute for a personal arrest; and it is not to be supposed that such attachment brings the subject matter in contestation more immediately before

the Court, than if the party were held in actual arrest. The character of the Court and the subjects with which it deals render it of signal advantage to suitors that its functions can be exercised in relation to maritime matters with all the benefits of a personal summons or arrest of parties, without incurring the delays, if not impracticability, of making a personal service of process. That end is effected by seizing the subject which gives cause to the litigation.

But it is urged, that if the libel be sufficient in point of form, the matters charged therein do not make a case of Admiralty and maritime jurisdiction, cognizable in this Court, because the cause of action, if any, arose not out of the original taking possession of the vessel and her cargo upon the high seas, but from transactions subsequent thereto, on land, at Key West, within the body of a county, so that if any wrong was there committed, the libellants must seek redress in a Court of law. It is not denied that if the original possession of the vessel had been wrongful, the act would have been a marine tort, and within the jurisdiction of this Court. When the jurisdiction of a Court of Admiralty has attached, it is not divested by means of acts subsequently done on land and cognizable by the law tribunals. Jurisdiction in Admiralty once acquired cannot be thus ousted. The after acts, when incidents of the first, are, in respect to jurisdiction, all regarded as one.

In this case, the cause of action is the taking and holding possession of the goods by the respondent, in the character and with the authority of salvor, to which all that subsequently transpired was incident. Over that principal act the Court has undoubted jurisdiction, and it also has cognizance of every accessory act done

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on land, although not of itself sufficient to confer jurisdiction. (1 *Kent's Comm.* 379; *The King v. Broom*, 12 *Mod.* 135; *Dean v. Angus*, *Bee's Adm. R.* 369.) Moreover, if the cause of action arose at Key West, it was in respect to property waterborne, and a sea-going vessel; and the Admiralty jurisdiction embraces ports and havens as a portion of the high seas. Nor is there evidence that the harbor of Key West is land-locked so as to be within the body of a county, and within the restriction of the English rule. (*Willels v. Newport*, 1 *Rolle's R.* 250; *Montgomery v. Henry*, 1 *Dall.* 50.) I am satisfied that, as a general rule, a party deprived of his property by any act on the high seas, whether that property be *jetsam*, *flotsam* or *ligan*, be abandoned by those who have charge of it, or be voluntarily delivered over by them to another without authority, has his remedy in this Court, because the transaction is of a maritime character, without regard to any question of marine tort connected with the possession. (*De Lovio v. Boit*, 2 *Gall.* 398, 468.)

It is insisted for the respondent, that admitting the Court at Key West had no jurisdiction, yet that objection had been waived by the assent of Seaman to the proceedings, and the subsequent composition and adjustment made by Earle with those claiming the cargo as purchasers under those proceedings. It is not necessary to inquire whether Seaman possessed authority to bind the libellants by the assent supposed, since the fact of the assent is not established. His appearance as a witness before the local Court does not amount to a submission to the authority, which the Court assumed, to award salvage and condemn the vessel and her cargo to sale, to satisfy its decree. He had no reason to

suppose the Court would do more than fix a reasonable compensation for the particular services rendered, and such compensation he professed a willingness to pay. When the Court ordered a sale of the vessel and her cargo, he remonstrated against and excepted to the whole proceeding, and thus plainly evinced that he never assented to or acquiesced in the authority which the Court undertook to exercise. As to the composition entered into by Earle, there is no question, that if one who is tortiously deprived of his property, freely and voluntarily compounds with the wrong-doer, the original tort is thereby extinguished, and cannot afterwards be made a ground of action, unless there was duress or fraud practised in obtaining the compromise. The \$72,500 were not paid to the respondent to discharge his lien upon the property as salvor, but was paid to parties who claimed the absolute title to the property as owners, and who are not now before the Court. Such payment, therefore, did not amount to a waiver of any rights whatever, as between the libellants and the respondent, at least without an express stipulation at the time to that effect. No contract or understanding of the kind is proved. It appears that Earle was unable to obtain the property in any other way. On the question of fact, therefore, whether the agent of the libellants acquiesced in the assumed ownership of the property, and paid the sum upon that footing, I am convinced, upon the evidence, that he did not, and that he insisted upon a reservation of all the rights of his principals, and refused to take any steps that might impair them. Earle's testimony is entitled to full credit. It is corroborated, also, by all the facts in the case, and is called in question only in some particu-

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lars by the testimony of Mr. Whitehead, who, though he has no such fixed legal interest in the case as would make him an incompetent witness, is nevertheless so implicated in the transaction as to be under a strong bias of mind adverse to the libellants and in favor of the respondent, as his own integrity is involved in upholding the judgment of the Court and the proceedings under it. I must, therefore, hold that the rights of the libellants remained, after the re-purchase or redemption of the property by Earle, in the same condition as before.

Since, therefore, the libel must be regarded as sufficient in matter of form and of substance, and the Court has jurisdiction in the case, and the libellants have established claims against the respondent not waived by them, it remains to determine the extent of the respondent's liability.

The libellants demand remuneration for all they have lost in consequence of the proceedings at Key West, on the ground that the act of the respondent in taking the brig into Key West was intentionally tortious, and that he is therefore liable for all the consequences of that wrong. But the evidence fails to establish any such wrongful intent. It has been already shown that he did not acquire possession of the brig by force or fraud, and did not retain her, by right of possession, against the demand of her owners, but handed her over to what was claimed to be the custody of the law. The decree of the Territorial Court having been unauthorized, he is liable to the extent of the property acquired by him under it, but he is not necessarily answerable for all the property the libellants have lost, into whose-soever hands it may have gone. It is evident that the respondent desired to go to Key West, yet there is not

enough to charge him with bad faith in the proceeding. There is, indeed, ground for suspicion that he intended or hoped to secure a more favorable award of salvage at Key West than he could expect at any other of the places proposed. But there are not enough circumstances to warrant the conclusion that he resorted to Key West for the purpose of perpetrating a fraud upon the parties interested in the brig or her cargo. The utmost sum for which he can be held liable is the sum received by him as salvage, which is asserted by the libellants to have been \$25,006 27; and it is not denied by the respondent that he obtained that amount.

On the other hand, the respondent rendered important services at a time when the brig was in a perilous situation on the reefs; and there is some reason for supposing that but for his timely appearance she would before long have been abandoned by her crew. He is, then, entitled to compensation therefor, unless he has, by his own misconduct, forfeited the right, not only to salvage, but to every other reward. If the charges made in the libel are sustained by the evidence, he has no claim to salvage. This Court, having a broad discretion in cases of this character, takes into consideration the merits and motives of the salvor, in regulating the amount of salvage to be awarded him, in some cases giving a large proportion of the property saved, and in others diminishing it to a compensation for pilotage or mere labor, or denying it altogether. (*The Vrouw Margaretha*, 4 Rob. 84; *Mason v. The Ship Blaireau*, 2 Cranch, 240.) It is charged upon the respondent that he neglected to inform the brig of her danger, though well aware of it, and fully able to warn her; that he predicted her grounding

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when he first fell in with her, and placed himself near the spot where it actually occurred, with a view to make a profit from the calamity which he was aware must befall her. The obligation which a vessel is under to warn another of a danger clearly discerned by her, but of which the other is ignorant, is so far an imperfect one that it may not supply a right of action by the party injured against the other for a neglect to comply with it. But if the party in fault comes into a Court of justice seeking salvage for rescuing the other from a danger which he might have prevented, it is clear that all right to a salvage reward is destroyed. That is a recompense resting essentially upon equitable considerations. The respondent, if he claims as salvor, must present his claims with clean hands. The evidence to show that the respondent was aware of the danger to which the brig was exposed, consists of his declarations on board his vessel, his answer to the libel, and his conduct at the time the brig was in view before her disaster. His declarations are sworn to by the master and seamen of the Hercules; but their evidence is open to obvious objections, and their depositions, like all *ex parte* examinations, are to be received with the greatest caution, particularly as, in this case, their testimony before the Commissioner was much more full and compromising to the respondent than their evidence as given in Court. His own answer to the libel is not so explicit as could be wished. The navigation of those seas and the situation and employment of the respondent are to be considered in estimating the character of this answer. The Gulf-Stream at that place runs northerly at the rate of at least three miles an hour. A northeast wind raises the stream

upon the Florida shore, and gives it a direction towards the land. From a minute chart of that section of the coast, previously made by the respondent, it appears that the current tends towards the spot where the Hercules grounded. No observation had been taken by the brig for one or two days before the accident, on account of the weather, and the master of the brig was out of his reckoning. The respondent was perfectly familiar with the navigation of those seas. He must have been able to determine whether the master of the brig was a good pilot or not. He was himself bearing straight for the land, and he observed the brig on a course varying but three or four points from his own, tending towards a long line of reefs, and continually nearing a lee shore, where there was no harbor, and where the danger to her must continue for hundreds of miles. The master of the brig supposed himself to be on the other side of the Gulf-Stream. The respondent, in his conversation with his son, anticipated danger to the brig, not from any change of wind or weather, but from her course when he last saw her. He predicted that she would "be either on the Bahama banks or Carysfort reef." It is not easy to see why the Bahama banks were mentioned. They were from sixty to one hundred miles distant on the other side of the Gulf-Stream. The wind, the current and the direction of the brig, all tended from the Bahama banks towards the Florida reefs. The respondent added: "unless the captain was a good pilot." But how much confidence he placed in the ability of the "captain" may be gathered from his having advised his son that they had better remain where they were, to be ready in case of accident. If danger was equally to

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be apprehended from the Bahama banks, why should they both remain sixty miles from those banks, and within a mile of Carysfort reef? Why did the respondent come to anchor at mid-day? He says, because the weather was squally; but it is abundantly shown that the sea was smooth at the time the Hercules ran aground. From these and other circumstances, I am convinced that the respondent understood the danger to which the brig was exposed, and kept himself in readiness to take advantage of an accident to the brig, should it occur.

The remaining question is, whether the respondent was able to warn the brig of her danger. The vessels were two or three miles apart, running with the wind, upon courses differing only three or four points. It does not appear that there would have been any danger or difficulty to the respondent in bearing directly for the brig; and, though his son says that he bore away one point for the purpose of speaking the brig, but she hauled her wind, as he supposed, to avoid him, yet this is wholly unsupported by any other evidence, and, had it been true, it must have attracted the notice of some of the seamen or officers of both vessels. The respondent also would have set it up in his answer as evidence of his having discharged his duty, but he makes no mention of any thing of the kind. It does not even appear that a flag was raised or a signal shown, and it is not to be assumed that the respondent was unable to warn the brig of her danger, without evidence of any attempt on his part to do so. His claim to salvage should, therefore, not be entertained. He has forfeited it by his conduct in the critical situation of the brig. He acted under a persuasion that she was about to incur the very danger which occasioned the

acceptance of his services, and he manifestly contemplated all that occurred. This fact takes from those services, however opportune and indispensable, those meritorious qualities which characterize a salvage service.

At the same time, the respondent rendered valuable assistance to the brig. He did not bring her on the reef, and was under no legal obligation to get her off; and he might have left her there without incurring any personal responsibility. It is evident that the brig was in danger, and the aid he offered was accepted by the master. Nineteen men and two vessels were engaged six days in lightering the cargo and transporting it to Key West, and in piloting the vessel there, a distance of from ninety to one hundred miles. Without pretending to estimate with great exactness the value of the services rendered, I shall allow the respondent therefor the sum of \$3,000.

The respondent must, therefore, pay into Court the balance of the money received by him from the proceeds of the brig and cargo, with interest, after deducting \$3,000. No costs will be allowed to the libellants, since the respondent, in retaining the money awarded to him at Key West, cannot be considered as wrongfully withholding it, as long as the right to it was not settled by a Court of adequate authority. The clerk must ascertain the proportion that the respective interests of the libellants in the brig and such of her cargo as was stowed below decks bore to the sum received by the respondent. The deck-load was thrown over-board before the respondent came on board. The clerk will then ascertain and report the proportion due to each of the libellants according to their several interests.

Decree accordingly.

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EBENEZER WATERBURY

vs.

JAMES MYRICK AND CERTAIN SPECIE.

An action will lie *in rem*, to recover a salvage compensation against the proceeds of salvaged property converted into specie, provided the same action would lie against the property itself.

The owner of a vessel which is employed in a salvage service may recover compensation for such employment out of the salvaged property, either as a co-salvor, by uniting with the officers and crew of the salvaging vessel in the suit, or by bringing it himself in his own right, in case they refuse or neglect to join.

An action *in personam* will lie by one salvor against a co-salvor, to recover a proportionate share of the salvage compensation, when the whole is received by the latter, and he withholds the share of the former.

An action *in rem* will not lie against money earned by a ship-master and supercargo as a salvor, whilst in the general employ of the libellant as owner of the vessel and cargo.

The owner of a salvaging vessel is admitted to share in the salvage reward solely on the ground of the risk and damage to which his property is or may be subjected, and consequently he can come in as a co-salvor only where his vessel has been the direct means of rendering the service for which salvage is awarded.

Where a ship-master did not use the vessel of the libellant, but pledged funds belonging to the libellant and others to procure another vessel in which the salvage service was effected: *Held*, that the libellant could not proceed *in rem* against the salvage money as a co-salvor.

Where, in an action *in rem* by an owner of a vessel, to recover a share of the salvage money earned by the master in saving a cargo of a wrecked vessel, it appeared that the cargo was saved, not from the vessel wrecked, but from an island on which it had been landed by her passengers, and that the salvage was not awarded by a competent Court, and there was no evidence to show the principles or rates on which it was adjusted: *Held*, that the libellant was not entitled to proceed *in rem* as a co-salvor.

Where a master was instructed, in his home port, to sell a cargo at the port of destination according to his judgment, and he landed the cargo there and proceeded to dispose of it on shore: *Held*, that this was not a maritime contract cognizable in an Admiralty Court.

Where a master, so employed, abandoned the sale of the cargo in order to effect a salvage service in a vessel procured by pledging the proceeds of the cargo: *Held*, that this was a breach of contract, for which no action lay in a Court of Admiralty.

February 6th, 1828.

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THIS was a libel both *in rem* and *in personam*. It alleged that the schooner Abigail, of which the libellant was sole owner, sailed from New-York on the 5th of December, 1826, bound for Tuxpan, in Mexico, with a cargo of goods on board, belonging in part to the libellant and in part to others, and arrived there in the latter part of the same month; that the respondent was master of the Abigail, and also consignee of her entire cargo, part of which was there disposed of for \$3,800; that soon after the arrival of the schooner at Tuxpan, and before the cargo was all sold, news was received there of the wreck of the brig Greek, with a valuable cargo on board, in the Mexican seas; that the respondent thereupon, abandoning the schooner to the care of the mate alone, and suspending the prosecution of the affairs of his vessel and cargo, proceeded upon a salvage expedition with her crew, having procured a small vessel for that purpose by pledging the funds of the libellant; that, with the vessel so procured, and by the aid of the crew of the libellant's schooner, and during the suspension of the libellant's affairs, the respondent succeeded in saving a part of the cargo of the Greek, to the value of \$13,000, and in delivering the same at Vera Cruz, subject to his claim thereon for salvage, which was afterwards awarded, to the amount of 56 *per cent.*, or \$7,312, the greater part of which was received by the respondent; that, by reason of the respondent's delay and neglect, the Abigail became unseaworthy, and her value, namely, \$1,500, was lost, or nearly so, to the libellant; and that the respondent, in April, 1827, had shipped to New-York a bag of dollars, and afterwards the further sum of \$1,800, parts of the said salvage by him received. The libel prayed

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that the said moneys might be seized and the claimants thereof be cited to appear, and that the respondent might be arrested and held to answer, and that the claim of the libellant might be satisfied out of the salvage moneys and otherwise.

The answer of the respondent alleged that previous to sailing he received a letter of instructions from the agent of the libellant, which was signed also by the libellant himself, authorizing him to sell the cargo of the *Abigail* at Tuxpan, but leaving the management of the affair to his judgment, with directions to acquaint himself with the trade, prospects, &c., of Tuxpan, and further authorizing him to sell the schooner, should a suitable opportunity occur, and also requesting him to make some exertions to dispose of her. The answer further alleged that other parties besides the libellant consigned goods by the *Abigail* to the respondent, which other consignors, it was claimed, ought to be made parties to the suit; that the respondent, not being able to dispose of the cargo at public sale, deemed it most for the interest of all concerned to sell it at retail, and accordingly hired a store and proceeded so to do; but that, before the cargo was sold, information was received at Tuxpan of the wreck of the *Greek*, with passengers on board, at the Triangle Islands, in the Mexican seas, from the mate of that vessel, who had been despatched, with one of the crew and a passenger, to procure relief, and who applied to the respondent for that purpose; that the respondent endeavored to procure relief from the commandant of Tuxpan, but without success, and thereupon hired a small schooner of sixteen tons, and deposited with the alcalde of Tuxpan, as security, \$1,000, belonging in

part to the libellant, in part to the other consignors, and a considerable part to himself on account of commissions and services; that he left the Abigail in charge of the mate and two men, and the store in charge of a Spanish clerk, by whom the residue of the cargo was sold; that he did not take with him any of the crew of the Abigail, with the exception of one boy, and did not go upon a salvage expedition, or with any other intention than that of saving the lives of those on board the Greek; that, on the 22d of February, he came in sight of the Greek, and discovered that her passengers were landed upon an island two or three miles from the reef where the brig lay, the master and crew having escaped in the long-boat; that he took from the island these passengers, with their provisions and a small portion of the cargo which could be conveniently carried, and, without making an attempt to approach the brig herself, started the same day to return to Tuxpan; that he was driven by contrary winds to Vera Cruz, and there reported himself to the American consul, and preferred a claim for salvage, and that 56 *per cent.* of the value of the cargo was awarded to him by referees, to whom the matter was referred by a competent Court; that the cargo saved from the Greek amounted to \$13,333, but that the salvage moneys received, after deducting expenses, amounted to \$5,065 97 only; that of this sum \$2,171 50 were awarded to the owner of the salving vessel; that the cost of repairs, and other expenses and losses, as set forth in a schedule annexed to the answer, reduced the amount of salvage received by the respondent to \$1,791 12; that, on his return to Tuxpan, he found the Abigail unseaworthy, and in a leaky condition, as she had been during the voyage,

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and her bottom worm-eaten, as he believed, and that she soon after sunk in consequence; that thereupon he caused her to be surveyed by the commandant of the port and others, by whom she was pronounced unseaworthy; that he afterwards caused her to be surveyed a second time by other parties, one of whom was a carpenter, and they reported that she could not be repaired for a sum less than her value, whereupon he caused her to be sold at auction for \$500; and that there existed in Tuxpan no tribunal to which resort could be had to procure a more formal condemnation.

The letter of instructions to the respondent, referred to in the answer, was given in evidence, and also a paper purporting to be a copy of an authentic document, to the effect that Captain James Myrick had appeared before the second constitutional magistrate of Vera Cruz, and demanded salvage for saving part of the cargo of the brig Greek, and that, there being no law in that country relating to salvage, two arbitrators were appointed, who reported one in favor of 50 *per cent.*, and the other of from 50 to 60 *per cent.*, and that thereupon the magistrate above-named granted 56 *per cent.*, to which the arbitrators and all parties agreed, and that the paper was accordingly signed by the magistrate and all the parties. All the other important facts are stated in the opinion of the Court.

Daniel Lord, Jr., for the libellant. I. The respondent was the servant of the libellant, being employed not only as ship-master, but as general servant for the entire adventure, and the libellant, as his master, was entitled to all his time and services, and therefore to his present earnings, namely, the specie arrested in this

action. (*Hart v. Aldridge*, Cowp. 54; *Blake v. Lanyon*, 6 T. R. 221; *Co. Litt.* 117 a, *Harg. not.*) By bringing a suit for the thing earned, the libellant waived the tort, and assented to the service, so that it became a service rendered by his servant, with his assent, and without any waiver of his right to the earnings. (*Lightly v. Clouston*, 1 Taunt. 112.) In regard to the case of *Mason v. The Ship Blaireau*, (2 Cranch, 240,) where the apprentice's share of a salvage remuneration was decreed to himself alone, it is to be observed, 1st. That the ship-owners were compensated out of the earnings of the apprentice; 2dly. That the exposure was of life, and not merely a rendering of services; 3dly. That the master is spoken of as having been already sufficiently compensated. II. The libellant, if not entitled to all the specie, as master of the respondent, was at least entitled to a part as a co-salvor. The grounds on which ship-owners receive a share of salvage are, 1st. The risk to which their property is exposed; 2dly. Motives of public policy, that they may permit their masters to render salvage services; and, 3dly. Because their property is the instrumentality by which the salvage is effected. (*The Haase*, 1 Rob. 286; *The Amor Parentum*, 1 Rob. 303; *The San Bernardo*, 1 Rob. 178; *The Cato*, 1 Pet. Adm. Dec. 48; *The Mary Ford*, 3 Dall. 188; *Mason v. The Ship Blaireau*, 2 Cranch, 240.) 1. In this case the property of the libellant was risked, and his funds were pledged. The privity between the respondent and the libellant was closer than that between the respondent and the other consignors, and the funds should be presumed to be the libellant's rather than theirs. (*Kemp v. Coughtry*, 11 Johns. R. 107.) The respondent himself had no in-

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terest in the funds, because the sales were not completed and his commissions were not earned. And other property of the libellant was risked, namely, the Abigail herself, she having been left in the care of others, in violation of the trust reposed in the respondent, and having been lost in consequence of such neglect. Moreover, other interests of the libellant were jeopardized, the custody and sale of the cargo having been entrusted to strangers, and no attempt having been made to explore the market and resources of Tuxpan, or to sell the Abigail, according to the letter of instructions. 2. A liberal allowance should be made to the libellant on principles of public policy, that ship-owners may be induced to throw no obstacles in the way of their masters engaging in such enterprises. 3. The salving vessel could not have been procured at Tuxpan without the pledge of the libellant's funds, so that they were the instrumentality by which the salvage was effected. All the grounds upon which salvage is granted to owners of vessels exist in this case to entitle the libellant to salvage. III. The question is one of distribution of salvage earned by the respondent at sea, in his capacity of ship-master; and salvage and its incidents are exclusively of Admiralty jurisdiction. (*The Cato*, 1 *Pet. Adm. Dec.* 48; *The Fair American*, *Id.* 87, 93; *The Cora*, 2 *Id.* 361, 373; *The Gloucester*, *Id.* 403; *Rowe v. A Brig*, 1 *Mason*, 372.) IV. The other consignors were mere freighters, and should not be made parties unless they see fit to appear and intervene. V. The award of salvage at Vera Cruz cannot be regarded by the Court. At all events, that award cannot affect the rights of the libellant as a co-salvor, but is only good as against the former owner of the property saved.

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Theodore Sedgwick, for the claimant and respondent.

BERRA, J.—The competency of this Court, as a Court of Admiralty, to entertain this action, will not be made a point of decision, although that question was largely discussed by counsel on the hearing. It is not a point specifically in issue, no exception having been taken by the pleadings to the jurisdiction of the Court, and the case not being one of sufficient doubt to induce the Court to hesitate in taking jurisdiction in the matter.

In disposing of the case, I shall assume, (1.) That the action *in rem* will lie by the owner of the *Adelaide* against the specie attached, provided it would lie against the merchandise saved from the cargo of the brig *Greek*. (2.) That the owner of a vessel which is employed in a salvage service may recover compensation for such employment, as a co-salvor, out of the salvaged property, either by uniting with the officers and crew of the salving vessel in the suit, or by bringing it himself in his own right, in case they refuse or neglect to join. (3.) That an action *in personam* will lie by one salvor against a co-salvor, to recover a proportionate share of the salvage compensation, when the whole is received by the latter, and he withholds the share of the former.

The remaining points which demand consideration relate, *first*, to the action *in rem*, and, *secondly*, to the action *in personam*.

(1.) Does the libellant make out a salvage interest belonging to him in the specie attached in this action? It is only in the capacity of co-salvor that he can proceed against this specie. To support an action *in rem*

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the libellant must show a proprietary interest in the money itself, as the produce of or substitute for property belonging to him. The action cannot be maintained on the ground that the relation of master and servant subsisted between the parties. It is true the libellant has sustained an injury by the conduct of the respondent, who was both master of the vessel and consignee of her cargo, of which the libellant was also part owner. The nature of the transaction between the parties required of the respondent strict attention and fidelity in the sale of the cargo, the business being entrusted to his personal judgment and discretion. Yet, during the time he was bound to render all his services to the libellant and to the other consignors, he withdrew himself from that service, and earned \$1,800 in a different employment. However praiseworthy his motive may have been, if his object was to rescue lives or property in peril, he cannot justify himself by that motive in abandoning his trust, and devoting his personal services and the money of the libellant to an expedition resulting in his own profit. This abandonment of his trust does not, however, give the libellant authority to proceed against the moneys attached.

In the first place, the money was obtained by the respondent on his claim for services as a salvor. These services are personal and hazardous, and are compensated upon other considerations than those of time and labor bestowed in rendering them, though these are important elements in fixing the amount. Even if the libellant could show a right to the proceeds of the ordinary services of the respondent, outside of his duty as master, he could not claim the extraordinary rewards which the respondent might receive for meritorious acts

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of bravery or charity. This was the principle of the case of *Mason v. The Ship Blaireau*, (2 *Cranch*, 240, 262, 270,) where it was held that a master of a ship could not claim the salvage money which his apprentice had earned, but that it belonged to the apprentice himself, notwithstanding the right of his master to his time and ordinary earnings. Besides, the right of the libellant to the personal services of the respondent must be measured by the contract, direct or implied, between them, and that cannot be construed to give him a right to specific moneys gained by the respondent otherwise than in his capacity of master of the schooner and consignee of her cargo. Nor could the libellant attach such earnings by Admiralty process, upon an equitable claim to participate in them, without showing a legal title in himself to those proceeds. Accordingly, if the contract is violated, the redress of the libellant is by action for damages for the breach; or, if he may waive the tort, and regard the abstraction of his funds as money had and received by the respondent, or borrowed by him, he can have no higher remedy for such right than the ordinary action at law to recover it back, and in neither case has he a privilege to arrest the money and hold that answerable in kind.

The libellant, then, can proceed *in rem* only by making out a salvage interest in the specie attached. The salvage interest claimed by him is not acquired in the ordinary way, by the use of his vessel in the enterprise, and in aid of the salvage service rendered by the master and by the men in his employment. The libellant's vessel was left in port, and the respondent obtained one belonging in Tuxpan, in which the adventure was carried out. He used for this purpose \$1,000, which

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belonged in part to the libellant, but not wholly, for it was the proceeds, but in what proportions is not shown, of the outward cargo shipped by various owners, and entrusted to the master to sell.

The maritime law empowers a master to employ, in a salvage service, a vessel under his command, and to put at hazard the interests of her owner; and it is for this reason only, that, upon considerations of general policy, the owner is indemnified for the risk to which his property is exposed, by being, as it were, *novated* as co-salvor. The owner's claim to participate in the salvage reward rests always upon the risk and damage to which his property is or may be exposed, and on no other ground. (*Mason v. The Ship Blaireau*, 2 Cranch, 240, 242; *The Ship Mary Ford*, 3 Dall. 188; *Bond v. The Brig Cora*, 2 Wash. C. C. R. 80.) But, in this case, the respondent was not, as master of the brig, authorized by the maritime law to devote the funds in his hands to these objects. It was a wrongful disposition of the money by the respondent, and does not import a voluntary contribution of it by the libellant; and, if the libellant may waive the tort, the money so used would not constitute the libellant a co-salvor. To this it may be added, that the funds so employed were not committed to the respondent for the uses of the voyage, but came into his hands abroad, as consignee of the cargo.

Strictly speaking, salvage is the reward of those who engage in the salvage service, and is participated in only by those who actually effect the rescue. (*The San Bernardo*, 1 Rob. 178.) The owner of the vessel is admitted to participate in the reward by Courts of Admiralty, upon equitable considerations, both that the

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vessel is usually an efficient instrument in the service, and because of the risk to which their property may be thus subjected. But the principle on which others than actual salvors are permitted to share in the salvage reward stops there. The libellant could not have sustained an action, as a salvor, against the merchandise saved from the brig Greek, and therefore he cannot, in that capacity, proceed against this specie.

These are impediments to an action *in rem*, which are not removed by any recognised principle of maritime law. The libellant claims, however, that though his vessel was not employed by the respondent in earning the salvage reward, yet his money was employed to procure another vessel for that purpose, and that the money may therefore be regarded as the salvaging instrument. If it be an admissible principle in the law of salvage that the owner of a vessel may come in with a claim for a proportion of the reward earned by his master in a salvage service, upon the ground that the master was enabled to render the service by using the owner's money, though the owner's vessel was not employed, still, in this case, there is the further objection that it does not appear that the respondent acted in his character of master of the Adelaide. On the contrary, his representative capacity, if any, was that of consignee and agent of all the shippers of the cargo; and accordingly the libellant fails to establish the important element in a salvage claim, to wit, that the money arrested is the earnings made by his property employed for the service by the respondent, whilst acting as his master.

Besides, in this case, there is no certain salvage reward proved to have been received by the respondent. The

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cargo of the Greek was not rescued at sea, nor taken from the ship in a perishing condition. It was found landed on one of the Triangle Islands, and was removed from that place by the respondent to Vera Cruz. I lay out of view what purports to be the order of the second constitutional magistrate of Vera Cruz. That order is accompanied by no evidence of the competency of the magistrate to exercise Admiralty powers, or that a suit was instituted, or any judicial proceeding had in the case. (*Cheriot v. Foussat*, 3 *Binney*, 220, 250; *Robinson v. Jones*, 8 *Mass.* 536.) The paper can be regarded, if evidence at all, as no more than an adjustment, assented to by the parties named therein; and the case stands as if the compensation had been paid by agreement, without the interposition of any judicial authority. There is, accordingly, no record evidence that the respondent is in possession of moneys legally awarded to him as salvage, so that a co-salvor could make common title to share in them. The respondent came into possession of the money, not by the decree of a maritime Court for a salvage service, but by a private arbitrament, and his compensation must be considered as awarded in part for the relief afforded the company of the Greek, but no means are furnished in the proofs for judging to what degree. If the pleadings in the case were such as to permit the trial of the questions of salvage and of the amount of compensation due to the respondent, all the meritorious parties are not before the Court, nor is there evidence to justify the Court in presuming that the services rendered to the property brought to Vera Cruz by the respondent merited a reward of \$1,800. Considering the question of salvage compensation as an open one

in the case, the Court is not enabled to say whether five hundred dollars, or even one hundred dollars, would not be an adequate reward for all that was done for the benefit of the property out of which this sum of money was detained, much less to pronounce that sum to be a fixed amount of which the libellant may demand a share in proportion to the amount of his money and the value of the time of his captain employed in obtaining it.

Again, there is ground upon which to raise a more serious objection to any right to salvage in this case. The pleadings are not framed on either side to meet it, nor has the testimony put the Court in possession of facts enabling it to pass understandingly upon the point as to whether the property brought by the respondent from the island to Vera Cruz was legally subject to a salvage charge. I have already stated that no evidence is furnished that it was declared to be so by a maritime tribunal. The libellant can make no color of title to this specie as a co-salvor, without satisfactory proofs that it is salvage money, and as such subject to his equitable lien. It would be a question for decision, whether the cargo brought into Vera Cruz could be proceeded against and condemned by a maritime Court for a salvage compensation. It had been rescued from the wrecked vessel, and carried ashore by the passengers, without the respondent's aid or participation; and, if it was subject to a salvage charge, that *prima facie* would attach to it in favor of those who rescued it from the sea, and not in favor of those who merely transported it afterwards to a proper place for sale.

In my opinion, either of the views above suggested is sufficient to free this money from liability to arrest

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by the libellant in the present action, and I therefore decide that he has not shown himself entitled to proceed *in rem* against it. •

There is a stronger show of right to sustain this action *in personam* against the respondent, on the ground that he abandoned wrongfully the vessel and business entrusted to him by the libellant and others, and went upon a sea expedition, out of which he realized large profits. There is an impressive equity in the demand of the libellant, that the respondent should not be allowed to desert his trust to secure a personal advantage, without being made to respond for the damages caused thereby; and there is force in the argument that he violated a maritime contract, and committed a maritime tort, by his abandonment of the vessel and of his command. I have been disposed to think that this Court was the proper *forum* in which to seek a remedy for the wrongful act, and that the contract entered into by the respondent was of a maritime character. I am in no way disposed to submit to the narrow doctrines of the English Courts of law, which fix at this day the boundaries of Admiralty jurisdiction. I shall always endeavor to uphold that jurisdiction in the measure which is allotted to it by the Constitution and laws of the Federal Government, and to sustain the action of this Court up to the limits recognised by our own national policy and laws.

The engagement entered into by the respondent to superintend the sale of the cargo on shore at Tuxpan comes within the actual claim of jurisdiction for Courts of Admiralty made by the civil lawyers, Zouch and Godolphin, and in the ancient sea laws. Judge Winchester selects out of the long enumeration by Zouch of sub-

jects of Admiralty jurisdiction, the following: "Whatever is of a maritime nature, either by way of navigation upon the seas, or negotiation at or beyond the sea, in the way of marine trade or commerce." (*The Sandwich*, 1 *Pet. Adm. Dec.* 235 n.) Yet, I do not feel satisfied that the employment in question, whether regarded as resting upon contract or upon abandonment admitted to be a wrongful neglect of duty, was of a quality to afford foundation for an action in an Admiralty Court. It is a fundamental principle touching the powers of those Courts, that the subject matter offered to their cognizance must be of a maritime character, in order to their exercise of jurisdiction over a case or a cause of action not arising upon the high seas. (*De Lovio v. Boit*, 2 *Gall.* 398; *Plummer v. Webb*, 4 *Mas.* 380; *The Mary*, 1 *Paine's C. C. R.* 671, 673.) And, in the present case, the libel must make a case resting upon a contract of the respondent having relation to his acts and undertakings as master of the schooner, or to services at sea outside of his duties as such master, or to some tortious act prejudicial to the libellant committed by him at sea.

The allegation of the libel that the respondent abandoned the *Adelaide*, and went upon a salvage expedition, taking with him part of her crew, if sufficient to bring the case within the jurisdiction of this Court, either as a wrongful act in respect to the vessel, or a breach of his obligation to her owner, is not supported by the proofs. The letter of instructions from the ship's husband, approved by the libellant, clothed the respondent with a large discretion in conducting the voyage, in respect to both the vessel and her cargo. He was intrusted with almost an absolute discretion, as

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to the latter, to make sale of it in the manner most advantageous, in his judgment, to the owners. He was also charged, rather emphatically, to sell the vessel if practicable. This broad discretion was granted him, because the shippers were ignorant of the population, wants or resources of the port of destination. In the execution of these powers, the respondent landed the cargo at Tuxpan, hired a store, and undertook to dispose of the cargo on land himself, by wholesale and retail. Whilst so engaged in the town, he left that employment, and entered upon the adventure in question. The respondent, then, was away from the schooner, acting as storekeeper and salesman, on shore, by the authority of the libellant. In my opinion, the breach of this duty and of his implied contract to devote himself wholly to the service and interests of the owners of the cargo, supplies no cause of action in this Court. The contract to become consignee and salesman of the cargo is not maritime in its character. It was purely an engagement on land, to be executed on land. His duty and responsibility under it are not to be distinguished from what would have been those of a resident merchant of Tuxpan who had been made consignee of the cargo. A consignee who takes his appointment at the port of departure, and carries it with the goods across the ocean to the port of destination, is under no more of a maritime contract in respect to the consignment than if he were appointed in the place of sale. The engagement to sell a cargo at the port of destination is of like nature with a contract to purchase one at the place of departure, and that manifestly is not now recognised in law as pertaining to Admiralty cognizance. A contract between consignor and consignee is no more

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a subject of maritime jurisdiction in favor of the former than of the latter. The remedy of both parties lies in a Court of common law. To that tribunal the libellant would have been obliged to resort for redress, had the same cause of action arisen against a resident merchant of Tuxpan, or even against a supercargo sent with the goods, with power to sell them in Mexico.

Then, as to the supposed tortious conduct of the respondent in abandoning the *Adelaide* and taking with him a part of her crew, it is to be borne in mind that there is no satisfactory evidence that his being away from the vessel was a dereliction of duty or a breach of his implied obligation as master. His absence was not only permitted but enjoined upon him by his instructions, if he considered it best for the interest of the shippers of the cargo. To make it a breach of duty, or a tort, to employ two of the men away from the vessel for his private profit, it should appear that the schooner was prejudiced by the act, or that some interest of the libellant was neglected, to his damage. But it is not proved that the loss or deterioration of the schooner was owing to any act or omission of the respondent. If any damage is to be implied, it would be merely nominal, because the vessel must necessarily have remained in port until her cargo was disposed of, and, from the evidence which has been put in, though imperfect, it would appear that the state of the winds and the draught of water at the bar of the harbor would have prevented her going to sea during the time her master was absent. There is no positive evidence as to the condition of the vessel, but, from her sinking so suddenly in consequence of the injury to her bottom by worms, it is to be inferred that she was not seaworthy. The

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ultimate loss is very probably attributable to the course taken by the master to make sale of the cargo. But whatever error of judgment he may have committed, there was in that no violation of his duty or of any contract. Nor, for the reasons above stated, would the taking the two boys from the vessel, in the manner and at the time it was done by the respondent, afford any cause of action against him because of any actual injury to the libellant.

Upon the whole case, I do not think that the libellant is entitled to maintain his action in this Court. The action *in personam*, however, bears so much more the aspect of one belonging to a maritime Court than the one *in rem*, that if the suit were brought against the respondent alone, I should hesitate to impose costs on the libellant. But, as he has made the gravamen of his action the right to maintain it *in rem* against the specie, and has failed on the merits in that, I think the decree must follow the usual course, and carry costs to the successful party.

Libel dismissed, with costs.

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A *bona fide* purchaser of the *whole* interest in a vessel, subsequent to a forfeiture incurred under the 16th section of the Act of Congress of December 31st, 1792, (1 *U. S. Stat. at Large*, 295,) by the sale or transfer to an alien of any interest in an American registered vessel, is not within the proviso of that section.

That proviso relates only to persons who are joint owners of a vessel at the time of the commission of the act which produces the forfeiture. Such a purchase will not prevent the forfeiture.

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The forfeiture takes place at the moment of sale or transfer to an alien, and any subsequent judgment of forfeiture relates back to that time.

The title of the alien purchaser, if he acquires any, is divested *eo instanti* by the statute, and he has left in him no interest which can be seized on execution.

A levy on the forfeited property, under an execution against the alien, previous to the prosecution of the forfeiture, will not prevent the forfeiture.

Whether previous possession by a State sheriff, under a *fi. fa.* issued by a State Court, excludes the marshal from arresting and taking into his possession, under an attachment issued by this Court, a vessel forfeited for a breach of the laws of the United States, *quære.*

A forfeiture under the statute above cited does not avoid the lien of seamen and material men, existing at the time of forfeiture.

February 6th, 1828.

VARIOUS proceedings were taken against the brig Florenzo in the port of New-York, which were brought before the Court upon the following pleadings: Two libels were filed on the 7th of September, 1827, by different parties of her crew, to recover wages earned on her last voyage. On the same day the Court ordered these suits to be consolidated. Process of attachment was issued in them, returnable on the 25th of September, under which the vessel was arrested. A petition was subsequently filed by a material man, praying to be paid out of the proceeds of the vessel. There was no dispute as to the services rendered by these parties; and the amount due to the libellants and to the petitioner were decreed to be paid them.

The United States subsequently filed a libel of information against the vessel, claiming her condemnation and forfeiture to the United States. The collector had previously seized the brig as forfeited under the provisions of the act of December 31st, 1792, (1 *U. S. Stat. at Large*, 287,) entitled "an act concerning the registering and recording of ships or vessels," the 16th section of which enacts, "that if any ship or vessel

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heretofore registered, or which shall hereafter be registered as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known in manner herein before directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited." The manner of making known such sale or transfer is prescribed by the 7th section, and is by giving up the certificate of registry to be cancelled. The libel alleged a transfer of the *Florenzo*, in whole or in part, by way of trust, to an alien, within the meaning of the act, namely, to one Pettit, without making known such transfer in the manner prescribed by the act, and claimed a forfeiture of the vessel, her tackle, apparel and furniture.

Against the libel of the United States two claims were interposed. One was put in by Whitehead Cornell, as owner, alleging a *bona fide* purchase by him of the vessel on the 1st of September, 1827, by a regular bill of sale therefor, from George Marsden, her master, an American citizen, and at that time her registered owner, for \$2,500, without knowledge or notice on the part of the claimant of any cause of forfeiture existing at the time. It was insisted for this claimant that Marsden was the real owner in his own right, or, if not, that the claimant's case came within the proviso to the 16th section of the act referred to, which is, "That if such ship or vessel shall be owned in part only, and it shall be made to appear to the jury before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to or ownership

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of such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to such forfeiture, and the residue only shall be so forfeited."

Upon the question whether the vessel belonged to Pettit or to Marsden, it appeared in evidence, that in September, 1826, the vessel was registered in the name of one Weathersby, and in November, of the same year, in the name of Marsden; but Weathersby testified that he transferred the vessel and cargo, by a bill of sale, for \$3,700, to one Arnold, who was a partner of Pettit, and an alien also, and that afterwards, at the request of either Arnold or Pettit, he made a bill of sale to Marsden, but that no part of the consideration moved from Marsden; and it was proved that he had not the means to purchase a vessel of the price of the Florenzo. Marsden, though cited to appear, could not be found; but it was proved by several witnesses that his statements as to his interest in the vessel, subsequent to her alleged purchase from Weathersby, were contradictory, he at one time alleging that he was her sole owner, at another time that he was part owner, and at another time that she belonged to Pettit and Arnold. Arnold testified that he and Pettit advanced money to Weathersby on the security of the brig and her cargo; that he afterwards, in October, 1826, by Weathersby's consent, and with his advice, sold the brig, without the cargo, to Marsden, for \$2,500, and that Marsden paid him one-half, namely, \$1,250, but whether Pettit received the other half he did not know; and that he had previously taken Marsden's note for \$4,000, to be given up on payment of the \$1,250. The register in Marsden's name was in November. The bill of sale from Weathersby to Marsden was not produced on the trial.

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tember, 1827, from George Marsden, the then owner, and he produces a bill of sale in support of his title. Although the evidence is not in all respects free from doubt, yet I am satisfied the weight of it proves that Marsden was not at the time the owner of the brig in his own right, but that, being an American citizen, he took the nominal title in his name, to hold her in trust for Pettit, or for Arnold and Pettit, both of whom were then aliens. This brings the case within the words of the statute, and the vessel must be declared forfeited, so far as the claimant, Cornell, is concerned, unless he brings himself within the proviso to the 16th section of the act. It is plain, however, from the language of the proviso, that it applies only to the case of joint-owners of a vessel, one of whom admits an alien to an interest in the vessel, without the privity of his citizen co-owner. The substance of the provision is, that if it appears that the other part owner was ignorant of the transfer to the alien, his share shall not be forfeited, but the residue only. He will not lose his interest in the vessel, by the misfeasance of his associate, to which he was not party or privy. Without this proviso, his interest would not be protected, because an absolute forfeiture of a vessel transfers the entire interest in her to the government, without regard to the claims of parties who did not participate in the cause of forfeiture. This is invariably so in respect to vessels confiscated for violations of the revenue laws.

Two things are necessary to protect the claimant under the proviso to the 16th section. *First*, he must be a part owner, (*The Margaret*, 9 Wheat. 421;) and, *secondly*, he must be such part owner at the time of the commission of the act which produces the forfeiture.

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But the claimant makes title to the whole vessel. He does not allege that he acquired a share in her, which the proviso might protect from the forfeiture incurred, because of the ownership of an alien in common with him, but he claims that he is the *bona fide* owner of the entire vessel. In the second place, he does not allege any interest in the vessel at the time of the commission of the act which produced the forfeiture. He acquired his alleged title subsequently. Clearly, then, he is not protected by the proviso to the 16th section, even if he had proved himself to have been a *bona fide* purchaser, without notice of any cause of forfeiture existing at the time of his purchase.

But there are forcible reasons to question the *bona fides* of the sale to Cornell. If he had not full knowledge of the situation of Pettit in respect to the brig, he had sufficient notice to put him upon his guard, and, if he then neglected to make proper inquiry, the law deals with his claim as if it were acquired with knowledge of the facts which reasonable inquiry would have disclosed. (*The Ploughboy*, 1 Gall. 41; *The Brig Mars*, 1 Gall. 192.) Cornell and Marsden stand, therefore, in the same position before the Court, and the vessel must be decreed to be forfeited, so far as their rights are concerned.

A second claim is interposed on the part of Samuel Candler. He alleges that he is a judgment creditor of Pettit, and that, at the time of the seizure of the brig by the United States, she was in the lawful possession of the sheriff of the City and County of New-York, under a *fi. fa.* issued on a judgment rendered in his favor by the Supreme Court of New-York.

It is not necessary, in this case, to decide whether the

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interest in the vessel which Pettit may have acquired was a subject of seizure and sale by the sheriff on a *fi. fa.* For, supposing it were, that will be of no avail, if the claim of title to the brig by the United States, from the time of the commission of the offence which caused the forfeiture, be upheld; for, in that case, all title, of whatever nature, of all persons, which was not saved by the proviso, was divested out of them, and became vested in the United States. A judgment of forfeiture is necessary to effectuate the title of the Government, but, when declared, it dates back, by relation, to the time of the commission of the offence, and consequently overrides all intermediate titles, however acquired. Against this general doctrine the position is taken, that where no specific mode of effectuating the forfeiture is prescribed by statute, it has no other effect than at common law, where the title to the thing forfeited does not become complete until judgment of forfeiture is pronounced by a competent Court. This is no doubt the common law doctrine, and the principle, to the extent above indicated, has the support of Judge Winchester, and of Chief Justice Marshall, Mr. Justice Story and Mr. Justice Washington. (*The United States v. The Anthony Mangin*, 3 *Cranch*, 356 n.; *The United States v. 1,960 Bags of Coffee*, 8 *Cranch*, 398; *The Brig Mars*, 1 *Gall.* 192.) These cases suppose that relation, being a fiction of law, should not be allowed to work an injury to any one, and therefore should not override the title of an innocent purchaser intermediately acquired; that if the forfeiture, which must often be secretly incurred, be indissolubly attached to the property, so as to divest the title of a purchaser without notice, great injury

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would result to the commercial interests of the country ; and that the mere attaching of a forfeiture as a punishment to a statute offence, does not exclude the common law doctrine of forfeiture, unless the statute distinctly so provides.

The weight of authority is, however, the other way, (*The United States v. 1,960 Bags of Coffee*, 8 *Cranch*, 398 ; *The United States v. Grundy*, 3 *Id.* 338,) and the distinction between forfeitures at common law and under a statute is established. The words of the statute are held to be imperative, making the forfeiture the necessary consequence of the offence, and dating its operation from the commission of the act. The same doctrine is laid down by the Supreme Court of this State. (*Fontaine v. The Phoenix Insurance Co.* 11 *Johns.* 293 ; *Kennedy v. Strong*, 14 *Johns.* 128.) The tenor of English adjudications is to the same effect. (*Roberts v. Wetherall*, 1 *Salk.* 223 ; *Roberts v. Withered*, 5 *Mod.* 195 ; *Robert v. Witherhead*, 12 *Mod.* 92 ; *Wilkins v. Despard*, 5 *T. R.* 112.) It has been for years the settled construction of acts of Congress which declare the absolute forfeiture of property as consequent to an offence committed therewith, that a judgment of conviction shall take effect, by relation, as of the time when the forfeiture was incurred. (*The United States v. 1,960 Bags of Coffee*, 8 *Cranch*, 398 ; *The United States v. Grundy*, 3 *Id.* 338.) Congress has not seen fit to change or interfere with this construction. Without, therefore, speculating upon what might have been the rule most consonant with equity when the question first arose, it is the duty of this tribunal, as the subordinate Court, to administer the law as it is interpreted by the Supreme Court, and, accordingly, whatever pro-

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perty Pettit acquired in this vessel by the sale to him, was, because of his alienage, divested *eo instanti*, and was vested in the United States by force of the statute. I shall accordingly hold that no interest of Pettit subsisted in the brig, which could be the subject of levy and arrest under the execution of the claimant, Candler.

It is further contended by the claimant, that the brig was in the custody of the law under the State process; that jurisdiction accordingly attached to the State Court, to determine the legal effect of the execution and the character of the interest of Pettit; and that, to pursue the case in this Court, would be to create a conflict between the judicial authorities of the State and of the United States. Under our system of Federal and State Governments, questions may arise rendering inevitable a conflict of judicial powers between their respective judicatories. Each will sedulously avoid encroaching upon the jurisdiction of the other, and, if the difficulty must be encountered, it will no doubt be met in a spirit of mutual forbearance and conciliation, and neither will attempt, except in most urgent extremities, to resist or counteract the authority of the other. When the same remedy may be had by litigant parties under either jurisdiction, there can be no occasion for any collision of powers, because the subject matter, if not transferable from one Court to the other, by way of error or appeal, will naturally be left to the disposal of the one first acquiring cognizance of it. Such was the case of *The Robert Fulton*, (1 *Paine*, 620.) The libel in this Court was by material men, to enforce a lien on the ship for materials and labor supplied her in this port. She was a domestic vessel, and the lien was

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one under a State statute. The vessel was held under a prior arrest for a like demand, by process from a State Court. There was no ceding to the authority of the State Court, but the United States Court decided in effect, that, as both tribunals were administering relief by virtue of the same law, the one first having possession of the subject matter could rightfully retain it. There was, moreover, a special fitness in that case, in the forbearance of the Federal Court to interfere, inasmuch as, in the State tribunal, the property would be held sequestered for the common benefit of all lien creditors, whilst in Admiralty the decree would have regard to no other parties than those litigant before the Court. That case does not, in any aspect, supply a formula for the present one, the proceedings in the two tribunals being now *diverso intuitu*, not looking to a common purpose or a common method of attaining it. In the State Court, the proceeding seeks to satisfy an execution in favor of a single judgment creditor, out of the vessel, as being the property of a judgment debtor. In this Court, the action demands the entire proprietorship of the vessel, under a title anterior to any supposed interest of the judgment debtor in her, which title is confirmed by an act of Congress. Jurisdiction over this demand belongs appropriately to the United States Court, and, if a suit were brought upon it in the State Court, that Court, if competent to take cognizance of it, would not be bound to do so by lending its support to the enforcement of a penal law of the United States. (*The United States v. Lathrop*, 17 *Johns.* 4.)

If the levy of a writ upon a vessel, under such circumstances, in a suit between individuals, could retain

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in a State tribunal authority to pass upon the title to the vessel as against the government, an easy means might be afforded, not only of evading a punitive law of the United States, but also of counteracting the national polity, which exacts that ships enjoying the privileges of American bottoms shall be the property of American citizens. In the municipal tribunals, a ship might, in all respects, be dealt with as a chattel interest, in which an alien could have a right of property, and that interest might be pursued irrespective of the navigation laws; and the government, if it litigated there, might be subject to hindrance and embarrassment in enforcing the policy upon which its commercial regulations are founded.

Moreover, the proceeding in the State Court could not have prevented a different party from arresting the vessel in the same or in another Court, or from taking her out of the possession of the sheriff by a writ of replevin or of detinue. The title or ownership was not in contestation under the levy. A purchaser under a sale on execution takes, by force of the judgment awarding the writ, no more than the interest of the defendant in the chattel. The judgment does not assume to determine that any legal interest of the defendant exists in the chattel. In the present case, the attachment of the vessel in behalf of the United States, on the claim of a full title to her, older in inception than the supposed interest of the defendant in the execution, creates no competition of jurisdiction between the two Courts. A conflict of authority would only arise, in case the Court out of which the execution issued should consummate a sale under it, by ordering the vessel to be put into the possession of the purchaser. This case is in no position for such a procedure, and there is no legal impediment

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to the arrest and condemnation of the vessel, as demanded by this libel.

If the possession of property by a State sheriff, under a *fi. fa.*, is to exclude the marshal from taking possession of it in execution of the laws of the United States, it might be made the means of preventing the revenue laws, including the laws against smuggling, from being enforced against vessels or their cargoes. An arrest by a sheriff, under State process, in behalf of a friendly creditor, might thus, by connivance, be made to exempt the guilty property from seizure under the process of this Court. This difficulty, however, does not arise in this case. The sheriff levied the execution on the 23d of August, and, on the 31st, an informer gave notice to the custom-house that the brig had incurred a forfeiture. She was immediately seized by the United States' officers, and has since remained in their charge. The sheriff proceeded to sell the cargo, but did not attempt to sell or hold the vessel. He made no objection to her passing into the custody of the marshal, and he now interposes no claim to her possession. It may be inferred from this, that the execution is satisfied, or that the levy under it is abandoned, leaving the brig within the sole power of this Court. The claimant, by acquiescing in the seizure, by his notice to the custom-house, and by putting in his claim here, is precluded from questioning the jurisdiction of the Court over the subject matter.

I shall therefore decree the condemnation of the vessel. The claim of Candler must be dismissed, with costs. The seamen and the material man are first to have their claims and costs out of the fund in Court. The forfeiture does not avoid their rights.

Decree accordingly.

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It is essential to a bottomry transaction, that the money lent should run the hazard of the voyage.

A master can, in a foreign port, hypothecate his vessel for the payment, without maritime interest, of money advanced by a stranger for necessary repairs, and to secure the payment of a bill of exchange drawn by him on the owner of the vessel for those advances, although he is himself owner of cargo more than sufficient to pay for the repairs, and is solely concerned in interest in the voyage.

Charleston (South Carolina) is, in respect to hypothecation, a foreign port to New-York.

Seemle, that the master may bottomry the ship for necessaries in a foreign port, when he cannot procure the necessary means from the funds or credit of the owner, whether he has sufficient funds of his own on board to meet the expenses or not.

In an action to recover advances made upon a bottomry bond, it is necessary for the libellant to exhibit an account of particulars and establish the necessity of the advances.

Whether the same rule holds in an action founded on a simple hypothecation, without maritime interest, *quere*.

August 5th, 1828.

THE brig William and Emmeline, belonging to the port of New-York, put into the port of Charleston, in the State of South Carolina, disabled and needing repairs; and, while she was there, on the 18th of August, 1827, her master, in consideration of \$511 48, advanced by the libellants, T. & T. Street & Co., drew upon the claimant, the owner of the brig, a bill of exchange for the amount, payable to the libellants, and, to secure the payment of the bill, executed what the libel alleged to be a bottomry bond upon the body of the vessel. The libel further alleged, that the money was advanced for necessary repairs, and that the bill of exchange had been protested for non-acceptance and non-payment. The answer admitted that the brig was

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hypothecated "in the manner stated in the libel," but set up for defence, that the master had no authority to hypothecate the ship; that Charleston was not a foreign port; and that the master was solely concerned in interest in the voyage, and had sufficient means of his own on board to procure the sum advanced, namely, lumber invoiced at \$690 20. The instrument of hypothecation contained this clause: "and, for the better securing the payment of the said bill of exchange, with interest and expenses, unto the said T. & T. Street & Co., their heirs, executors, administrators and assigns, in any port or place where the said brig may be, and this bond be produced, I do hereby bind myself, and all and every of the owner and owners of the said brig, and particularly the said brig, her tackle, apparel and furniture, and the freight of the cargo on board of her, for the payment of the said bill of exchange, together with the interest, damages and expenses that may accrue thereon unto the said T. & T. Street & Co., their executors, administrators and assigns." The instrument was intended to secure only the sum for which the bill of exchange was given. There was no stipulation for marine interest, and the payment of the bill was not dependent on the hazard of the voyage.

Andrew S. Garr, for the libellants.

Gerardus Clark, for the claimants.

BERRIS, J.—It is essential to the validity of a bottomry transaction, that the money lent should run the hazard of the voyage. (*The Nelson*, 1 *Hagg.* 169; *Abbott on Shipp.* ed. 1830, 117, *et seq.*; 2 *Marsh on Ins.* 632; 2

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Black. Comm. 458; *Pothier, Prêt à la Grosse*, art. 2, § 3.) It is such risk that supports the marine interest which is always a constituent of a bottomry bond. (*The Augusta*, 1 *Dod.* 283; *Abbott on Shipp.* ed. 1830, 117, *et seq.*; *Rucker v. Conyngham*, 2 *Peters' Adm. Dec.* 295; *The Mary*, 1 *Paine*, 671.) In the instrument of hypothecation in this case, neither marine risk nor marine interest is provided for. The personal liability of the master and owner is secured at all events. All that is stipulated by way of hypothecation is, that the libellants shall have a lien on the vessel, her appurtenances and freight, during the voyage specified, and afterwards, until the satisfaction of the debt, interest and expenses. This instrument, though treated by the counsel in the pleadings and on the argument as a bottomry bond, and though denominated in the bond "an obligation of bottomry," is not so, in the acceptance of that peculiar security in the maritime law, not being subject to the incidents of a bottomry.

The power of a master, in case of necessity, to raise money, by hypothecation of his ship, in order to prosecute his voyage, is not in question. The question is, whether the instrument in this case is a valid exercise of his authority. It is immaterial whether it be called a pawn, a hypothecation, a mortgage or a bottomry. The intention of the contract is, to pledge the brig and her freight for the payment of the disbursements of the libellants advanced for her repairs and refitting, and for which a bill of exchange was drawn by the master on his owner. His power to impawn the ship for her necessities, is declared by the earliest writers. (1 *Molloy*, b. 2, ch. 2, art. 14.) In the case of *Samsun v. Braggington*, (1 *Ves. Sen.* 443,) in addition to the hy-

pothecation of the vessel, a bill of exchange was drawn by the master, in a foreign port, on his owner, to cover advances made in behalf of the vessel. The ship having been captured on her voyage home, the holder of the bill was allowed to recover the money of the owner; and it was also said that the ship was well hypothecated. This case is cited with approbation in *Abbott on Shipping*, ed. 1830, p. 125. It may, perhaps, be questionable whether the English Admiralty Court would have enforced the hypothecation. The element of marine risk being wanting, the transaction was not a bottomry; and it may be that that Court would have declined to take cognizance of a case where the advance made was not solely upon the credit of the ship, and on a bond properly of a bottomry character. (*The Augusta*, 1 *Dod.* 283; *The Rhadamanthe*, 1 *Dod.* 201.) In this country, however, Admiralty will take cognizance of a hypothecation which is not a bottomry in form, when made in a foreign port. (*Robertson v. The United Insurance Co.* 2 *Johns. Cas.* 250. See *Jennings v. Ins. Co. of Penn.* 4 *Binn.* 244.) Indeed, as a general principle, every maritime lien on a ship is a tacit hypothecation. (*Emerigon, Contrat à la Grosse*, ch. 12, sec. 2.) And what is a tacit hypothecation will not lose its effect by being made an express one. By the civil law, every person who repaired or fitted out a vessel, or lent money for those purposes, had a lien upon the vessel therefor, without any express hypothecation. (*Dig. lib.* 42, *tit.* 5, *lex* 26; *Novel.* 97, *cap.* 3; 1 *Valin*, 606; *Hall's Emeri.* 217.) In England, on the contrary, such a lien can only be acquired by an express agreement of the owner, or of the master, acting within the scope of his authority. (*The Zodiac*, 1 *Hagg.* 320,

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325 ; *Abbott on Shipp. ed. 1830, 108, et. seq. ; Hussey v. Christie, 13 Ves. 594.*) In this country, the law has been recently settled by the highest tribunal, that in the case of a domestic ship, the municipal law (which is, in most States, the common law) prevails, and that such advances and credits are no charge upon the ship, unless made so by the law of the State where the debt accrues, but are only a claim upon the owner personally. In the case of foreign ships, however, the State laws do not prescribe the rule ; and the maritime law of this country, following the civil law, gives the party, without the aid of any special contract, a lien upon the ship itself, which may be enforced by a suit *in rem* in the Admiralty. (*The General Smith, 4 Wheat. 438 ; Abbott on Shipp. ed. 1830, 116 n, 125 n.*) This doctrine became an element in the maritime usages of the middle ages, and thence was engrafted on the law maritime of modern Europe. (2 *Cons. del Mare, ch. 32, Paris ed. 1808 ; 1 Azuni's Mar. Law, pt. 1, ch. 4.*) It follows that, by the principles of the law maritime, a suit in Admiralty to recover advances for the necessary supplies of a ship can, in the case of a foreign ship, be sustained in the American Courts in all cases, without any express instrument of hypothecation. As a suit will lie in the Admiralty on the lien implied by the law in such cases, there seems to be no reason for holding that the lien is lost because an express hypothecation is made by an informal instrument. (*Abbott on Shipp. ub. sup.*) Should the bond in this case then be regarded as irregular, or inadequate to pledge the vessel, it would not, in Admiralty, be considered an abrogation of the original lien, and the suit might be maintained on that by an appropriate amendment of the libel.

The fact that the master is solely concerned in interest in the voyage, makes no difference. Third parties, dealing with him as master, are deemed to act upon the credit of the vessel, and are not chargeable with notice of his secret relations with the owner. Their security will, in this respect, be preserved to them, notwithstanding any special arrangements with the owner, detracting from the ordinary force of the master's acts, as implied from his office and trust. The rule applies as well when the master is charterer or lessee of the vessel, as when he is in command only on behalf of the owners, (*Rich v. Coe, Cowp.* 636,) unless the creditor has notice of his relation to the vessel. His possession as master is *prima facie* an authority from the owner to bind the vessel for necessities supplied to her abroad. In the better acceptance of the doctrines of the law maritime, the master is *ex officio* agent or trustee of the owner, carrying, in that relation, a presumptive letter of credit in all places abroad where his vessel goes, to act for the owner in the employment of the ship, and in obtaining for her supplies and necessities. (*Abbott on Shipp. ed.* 1830, 132.)

It remains to be considered whether Charleston is, for purposes of hypothecation, a foreign port, with reference to New-York. The Supreme Court of this State has held that Charleston is not a foreign port in a case where a statute which gave to Justices' Courts, in New-York, jurisdiction over assaults committed in foreign ports, was adjudged not to authorize jurisdiction over an assault committed in Charleston. (*King v. Parks*, 19 *Johns.* 375. And see *Miller v. Hackley*, 5 *Johns.* 375, and *Overseers of Chatham v. Overseers of Middlefield*, 19 *Johns.* 56.) It has been decided other-

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wise, however, in respect to bills of exchange. (*Duncan v. Course*, 1 *Const. Rep. So. Ca.* 100; *Bayley on Bills*, *Bost. ed.* 14 n.) These cases would not, perhaps, be deemed controlling in the local Courts on a question of maritime lien. By the civil law, and the laws of France, all ports where the owner does not reside are treated as foreign. (2 *Valin*, 10, 11; 2 *Emer.* 424, 436, 437.) This is not the rule in England, however. The whole of England proper is considered, in respect to the ownership of vessels, as the home of an Englishman; (*Abbott on Shipp. ed.* 1830, 123; *Jacobsen's Sea Laws*, 363;) but Ireland is regarded as foreign. (*The Rhodamante*, 1 *Dod.* 202.) It is believed, that though the point has not come up for direct adjudication, yet the Courts of the United States have, in maritime questions in respect to the employment and refitment of vessels, considered the States foreign in relation to each other. (*The General Smith*, 4 *Wheat.* 438; *Murray v. Lazarus*, 1 *Paine*, 572, 576.) In the case of *La Ysabel*, (1 *Dod.* 273, 274,) Lord Stowell held two ports in Spain to be foreign to each other, on the ground that "the law does not look to the mere locality of the transaction. The validity and invalidity of the bond does not rest upon that circumstance only, but upon the extreme difficulty of communication between the master and owners." Without deciding how far this would be the correct principle upon which in all cases to determine what are foreign ports, I am of opinion that Charleston is to be regarded in this case as a foreign port, and that the master had authority to hypothecate the vessel there.

Another ground of defence relied on by the answer is, that even if the master might ordinarily pledge his

vessel in the port of a State out of her domicile, he could not do so in this instance, because he had sufficient means of his own on board to procure the sum required for her necessities. It is well settled, that the master cannot raise money on bottomry when he has funds of the owner in his possession, or can raise the necessary sum upon the personal credit of the owner. (*The Nelson*, 1 *Hagg.* 169.) But that he is prohibited from raising money even on bottomry because he has sufficient funds of his own at command, is a point by no means made certain by the authorities. The principle has been broadly laid down, that if the master has or can command other funds, he has no authority to bottomry the ship. (*Walden v. Chamberlain*, 3 *Wash. C. C. R.* 290, 294; *Boreal v. The Golden Rose*, *Bee's R.* 131; *Forbes v. The Hannah*, *Id.* 348.) And, in support of this doctrine, there are impressive opinions both in England and in this country. (*Cupisino v. Perez*, 2 *Dall.* 194; *The Packet*, 3 *Mason*, 255, 267; *The Zodiac*, 1 *Hagg.* 320; *The Sydney Cove*, 2 *Dod.* 11; *The Hero*, 2 *Dod.* 139; *Molloy*, b. 2, ch. 11, § 11; *Abbott on Shipp.* ed. 1830, 125 n.) On the other hand, it is distinctly intimated by the Supreme Court of the United States, that the master may hypothecate the ship, unless he has the funds or credit of the owner to rely upon. (*The Aurora*, 1 *Wheat.* 96.) To the same effect is the law of the Hanse Towns. (*Jus. Marit. Hans. Hamb.* ed. 1667, tit. 6, art. 2, p. 51, and *Kuricke's Commentary*, same ed. 176. See also 2 *Marsh on Ins.* b. 2, ch. 1, and *Lex. Merc. Americ.* 354.) I am inclined to the opinion, that the true spirit of the maritime law is, that the master has a right to pledge the ship when he cannot command means to supply her necessities.

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either from the funds or credit of the *owner*, as well when the ship is laden with his own goods as when she is laden with those of a general freighter; but whether he can also subject her to marine interest, I do not undertake now to decide. It may be well asked, on what principle of justice can the master be compelled to appropriate his own property to the benefit of the ship-owner. It is from no privity of contract, nor from any consideration peculiar to the master, arising out of the shipment. The owner derives the same advantage from the goods shipped by the master as if they were put on board by a third party. They are alike charged with freight, and subjected to average for the benefit of the ship, and the master, as freighter, has no community of interest with the owner of the vessel which is not shared by other freighters. If, in case of urgent necessity, the goods of a shipper are sold by a master for the repair or refitment of a vessel, the loss sustained is, by the maritime law, a lien on the vessel. (*Emerigon*, ch. 4, § 9; *Id.* ch. 12, § 4.) If the master is bound to use his own goods for that purpose, it must be because he is, equally with the owner, bound to make repairs, and then he could have no claim to indemnity from the residue of the cargo, unless his loss was one of a general average character. (*Benecke*, 252.) Nor is it by any means certain he could have a lien on the freight and vessel for the amount of such expenditures. (See *Hussey v. Christie*, 9 *East*, 426, and *Smith v. Plummer*, 1 *B. & A.* 575.) Though, should the freight chance to come to his hands, he might undoubtedly retain it as security. The case of *Ingersoll v. Van Bokkelin*, (7 *Cow.* 670,) imports that a master has a lien on the freight for his disbursements and liabili-

ties, and for his wages also. This case can hardly be reconciled with the scope and spirit of the law maritime, unless it is to be understood as making the possession of the cargo retained by the master to secure those demands, tantamount to a receipt of the freight chargeable upon the cargo, so that what is termed a *lien* becomes his right to retain security out of the freight paid him. It is believed no other case has recognised a lien in favor of a master for wages, upon the vessel or cargo in his hands; though, by special enactments, the master is sometimes placed upon the same footing with seamen in respect to wages. (*Code de Commerce*, art. 191.) This right to retain is a partial security, so far as it goes; but it would clearly be insufficient to indemnify a master for the privation of his property, since it covers no more than his actual disbursements, and he may be subject to losses from the forced sale of his shipment at a port for which it was not designed, and be obliged to forego the advantages anticipated by a sale at the port of destination. These would seem to be adequate reasons for allowing the master, in a proper case of necessity, to raise money on a hypothecation of the vessel, though he has or can command sufficient funds of his own. The maritime law guards, with vigilant circumspection, the exercise of the power of hypothecation by bottomry, and it can rarely happen, that if the enjoined requisites are observed, an owner's interest can be essentially compromised by a master, even in raising money upon such pledge of the vessel.

The decision of this case does not, however, rest necessarily upon these principles, inasmuch as the bond in this case was not a bottomry. The transaction, as proved to the Court, was a credit to the owner and to

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the vessel herself, procured by the intervention of her master in a foreign port, and of such a nature as to create a lien upon the vessel, without express stipulation.

When an advance is made upon bottomry, the libellant must establish the necessity of the advances, and exhibit an account of the particulars, that the Court may pass upon that fact. (*Walden v. Chamberlain*, 3 Wash. C. C. R. 290; *Crawford v. The William Penn*, Id. 484; *The Mary*, 1 Paine, 671; *The Aurora*, 1 Wheat. 96, 103, 106.) By the French law, when the bond of hypothecation alleges that the loan was on the body and keel of the vessel, it is received as full evidence that the money was employed in the use of the ship and for the necessities of the voyage. (2 *Valin*, 9; *Pothier, Prêt à la Grosse, Avent. art. 4, § 2.*) But by our law, as appears from the cases cited, the Court must examine the proceedings, and determine the propriety and necessity of the bottomry pledge.

Whether the principles of maritime law render it incumbent on the libellant, when there is a simple hypothecation without maritime interest, to exhibit satisfactory evidence that his demand arose for necessities furnished the ship, it is not necessary in this case to decide. The authority of the master to bind the owner is limited to the supply of necessities for the ship. (*Abbott on Shipp. ed. 1830, 116 n.*) The master is declared by all the authorities to be the agent of the owner *pro hac vice*. (*Abbott on Shipp. ed. 1830, 108, 109.*) If, as is contended in this case, the libellants must prove the necessity of the advances in order to sustain their lien on the vessel or an action against the owner, it would seem that the general law governing the rights of third persons arising out of transactions

with agents must, in respect to this class of contracts, have a restricted application. The familiar rule of law is, that the acts and declarations of the agent within the scope of his authority are evidence against his principal. (2 *Starkie's Ev.* 41, 43, *pt.* 4.) The well-known distinction between general and special agents would not account for any change of the principle in regard to maritime agencies. For, though a special agent (which a ship-master is) must be strictly held within the limits of his authority, (2 *Kent's Comm.* 620, *et seq.*; *Paley on Ag. ch.* 3,) yet, where the authority is established, the like doctrine as to his proceedings governs in both cases. The plaintiff need show no more than the dealing of the agent, and that his acts or declarations were in conformity with his authority. At common law, an authorization to a broker or mechanic to provide necessaries for repairing a ship or house, would refer to the judgment of the agent the determination of the necessity of the particulars furnished, and the principal would be bound by his decision; (2 *Kent's Comm.* 617, 621, 629;) and that doctrine ought to have the same effect in respect to the doings of a ship-master as agent of the owner.

If it is necessary to establish in this case that the articles furnished were necessary for the use of the vessel, the libellants rely upon the general allegations of the libel, which are not denied by the answer, and upon letters of the claimant, which I am inclined to regard as substantially admitting the fact. These letters show that the claimant was duly apprized of the circumstances, and was satisfied at the time that the vessel had been repaired in a state of distress by the funds of the libellants, and that the amount claimed by them

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had been expended for that purpose. The recognition of these facts by the claimant, whether directly made or whether necessarily to be implied from the circumstances of the case, must be equivalent, in effect, to any other mode of proving them. The manner in which the suit has been contested would naturally have led the libellants to rely upon slight proofs on this point. The answer does not deny the distress of the vessel, nor that the advances were made, nor that they were expended upon necessaries for the voyage; but assumes, as ground of exoneration, that the master had no right to contract the debt on account of the owner, at Charleston, that not being a foreign port, and that the master was solely interested in the voyage, and had means to meet the charge, and was therefore alone liable. It is true that the allegations of the answer are broad enough to permit the claimant to avail himself of the other objections; yet, if they must not be considered as impliedly waived, they are so faintly urged as to render a less amount of evidence adequate to surmount them. The case is in such a posture, that if I were not satisfied by the evidence offered, I should, for the reasons above stated, permit it to stand over for further proof upon these particulars. I do not now deem it necessary to require that further proof from the libellants; but, upon a proper suggestion on the part of the claimant, that there is reason to suppose there are charges in the claim for which he ought not to be liable, I shall be ready to refer the matter to the clerk, to report to me the items of the demand and the evidence upon which they rest. If no such application is made, the amount of the bond, with interest and costs, is decreed to the libellants.

Decree accordingly.

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After the liens upon a libelled vessel are satisfied out of the proceeds of her sale, the surplus funds remaining in Court are subject, as against the owner, to the master's claim for wages and for disbursements on account of the vessel up to the time of her seizure, but not for wages or disbursements after the time of her seizure.

May, 1829.

THESE were petitions in regard to the disposition of the surplus moneys arising from the sale of a libelled vessel, the brig Santa Anna. The facts are sufficiently stated in the opinion of the Court.

BETTS, J.—This vessel has been libelled and sold to discharge seamen's wages, and the surplus, after satisfying the libellants, has been paid into Court. Two petitions are now presented for these proceeds. One is by the master, who was engaged in June, 1828, and navigated the vessel until she was sold, and who seeks satisfaction for his wages and disbursements on account of the vessel, for that period. The other is by one Tracy, a creditor of the former owners of the vessel, and who represents that she was assigned to him as security for advances made in December, 1827. The letter of the former owners, to which he refers as evidence of the pledge of the vessel, asserts a positive sale of the vessel to Tracy for \$4,000, and that he is her true and lawful proprietor. It would be unjust to allow him, clothed with this double capacity of assignee or owner, as his interest may lead him to act, now to put forward the one which may be most to his own advantage, and most prejudicial to the other petitioner.

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If, therefore, the claim of the master will be at all strengthened by holding Tracy to the character of owner of the vessel, he has a right to require him, under the proofs presented, to stand in Court in that capacity alone.

It appears to me that a very essential difference exists between the privileges of a creditor who has a prior *bona fide* lien on a vessel, and those of the owner, in a controversy with the master relative to the proceeds of such vessel after her sale upon liens. As against such creditor, I do not well perceive how the master could maintain a claim for his wages, as the law seems settled that he has no lien on the vessel in that behalf, which he could enforce specifically against her or against the moneys in Court which represent her. (*The Favorite*, 2 Rob. 232; *The Grand Turk*, 1 Paine, 73.) But however this may be, he is entitled to payment out of these specific moneys, as against the owner. As to his wages, he has a right to resort to this Court for their recovery, by an action *in personam* against the owner. (*Willard v. Dorr*, 3 Mas. 91.) The demand of a master, equally with that of a seaman, for wages, falls within the cognizance of a Court of Admiralty; and the decree, when rendered, will be made alike efficacious with respect to any means of the owner within reach of the process of the Court.

Although the marshal might not be able, by his execution, to reach funds deposited in Court, still the Court would not allow those funds to be paid over to the owner until the decree was satisfied, as no one can obtain the funds without satisfying the Court that he is equitably entitled to them. The equitable power of the Court would be ample to retain the funds, to

enable a creditor to pursue his relief against them by bill in equity, or it might direct their application on its decree for a maritime demand, upon the petition of the libellant in such decree. Courts proceeding according to the course of the common law, have exercised a like authority over funds placed in Court by virtue of process, or remaining in the hands of the officers of Court. Upon that principle, moneys in the hands of a sheriff, after satisfaction of the process which made them, have, on summary motion, been applied upon executions subsequently delivered to him. (*Armistead v. Philpot*, Doug. 231; *Ball v. Ryers*, 3 Cai. 84; *Van Nest v. Yeomans*, 1 Wend. 87. See, however, *Williams v. Rogers*, 5 Johns. 163, and *Willows v. Ball*, 5 Bos. & Pull. 376.) In some of the States of the Union, such funds have, by statute, been made subject to levy. The Court of Chancery, too, will exercise its broadest powers to retain and decree for a suitor whatever moneys, derived from or held by those who ought to respond to him, may be within its control.

The authority of a Court of Admiralty is not less extensive and salutary, and, under like circumstances, is exercised in the same manner. Accordingly, although, for reasons very little consonant with the enlarged and remedial principles cherished in this Court, a master cannot maintain an original suit *in rem* for wages, or for materials or advances furnished by him to the ship under his charge, yet he is allowed to come in and obtain a satisfaction for his services and for such advances, from surplus moneys in Court arising from a sale of the ship. (*Gardner v. The Ship Jersey*, 1 Peters' Adm. Dec. 223; *Zane v. The President*, 4 Wash. C. C. R. 453, 457. See also *The John*, 3 Rob. 288.) The justness of the master's demand, in this case, is ad-

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mitted by the other petitioner. A part of it is for disbursements made for the ship, and falls within the terms of the case of *Gardner v. The Ship Jersey*; and the rest is for his own wages, and comes within the principles already stated. The whole, it seems to me, should be treated by this Court as if evidenced by a decree for the amount. In the case of such a decree in form, the money would be withheld from the owner until the decree was satisfied; and I shall apply the like principles to the present state of facts. Holding that the master is entitled to have Tracy regarded in this application as the real owner, I shall order payment out of the surplus moneys in Court to the amount of the master's account, both for disbursements and for his own wages up to the time the vessel was seized.

The account of the master which accrued subsequently, did not arise from his charge and responsibility as master of the vessel, as she was then in the custody of the law; and if he was employed in port as keeper, by the marshal, he must obtain his compensation from the marshal; and it will be then for the Court to decide whether the payment will be allowed the marshal in the adjustment of his accounts against the vessel. It does not appear that Tracy ever assented to that employment of the master, or had any knowledge of it. Nor, if his acquiescence could be shown, would it probably vary the case, as the contract of Tracy or of the marshal with the master, would be regarded as personal and not of a maritime character coming within the jurisdiction of the Admiralty, none of the parties having had authority, during the arrest of the vessel, to make contracts respecting her, except under the express order of the Court.

Order accordingly.

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Seamen are competent witnesses for each other in suits for wages earned on the same voyage.

By the act of Congress of July 20th, 1790, § 6, (1 *U. S. Stat. at Large*, 132,) a seaman is restricted from bringing an action for wages against a vessel, in her port of delivery, until ten days after her cargo is discharged, unless she is about to proceed to sea before the expiration of the ten days.

Whether the seaman must wait ten days in case of an absolute discharge by the master, *quere*.

Parol evidence on the part of a seaman is admissible to vary or contradict the written contract contained in the shipping articles.

A stipulation in the articles that the seamen shall not in any case demand their wages until the expiration of a certain time, is void, in case the service is completed or the seamen are discharged before the expiration of that time.

As soon as a seaman's connection with a vessel is legally dissolved, his right to resort to her *eo instanti* for his wages is consummated.

Scoble, that an agreement in shipping articles that the seamen shall not sue for their wages till three months after their services are ended, will be held void as against the seamen.

October, 1829.

THIS was a libel *in rem* to recover seamen's wages. The libellants shipped in Maine, on the 8th of October, 1828, on a trading voyage for nine months, as they alleged. The vessel entered the port of New-York from Europe in September, 1829, and discharged her cargo. The libellants alleged that she was about to proceed to sea again forthwith, and that they were discharged by the master, their wages remaining unpaid. The master answered, denying that wages were due, and also alleging that the libellants left the ship without his consent, and before their term of service had expired. The proofs on the part of the claimants were the shipping articles, and three depositions taken in the State of Maine, one of the person who filled up the shipping articles and saw two of the libellants

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subscribe them, and the other two of sailors who shipped at the same time. The evidence for the libellants was the deposition of each libellant for the others. Objections to the admissibility of the proofs were taken on both sides. The remaining facts necessary to the understanding of the case are set forth in the opinion of the Court.

Edwin Burr, for the libellants.

Alexander H. Dana, for the claimants.

BETTS, J.—The claimants insist that the libellants are incompetent witnesses for each other, as their rights rest upon precisely the same ground, and the testimony which supports the recovery of one will equally enure to the benefit of all. This position is not, however, accurate in point of fact. The libellants have no joint interest in the matter in suit, nor any concurrence of purpose, further than that their testimony tends to establish a right of action. Each recovers independently of the others, and any matter in abatement or bar of the action of one will in no way affect the rights or remedies of his associates. They do not unite in the action because of any common interest between them, but because, the ship being the fund which is to discharge the wages, the action is made common to all, in accordance with the maritime law and the express provision of the statute, which would compel the suits to be consolidated if brought separately.

In most cases, seamen cannot be witnesses for each other in a suit in which all are involved, the rules of pleading and evidence being then applied to them as

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to other parties. But they are admitted to testify for each other in relation to their claims for wages earned on the same voyage, because they are only united on the record, whilst their interests in the recovery and their liabilities to costs are wholly distinct. The evidence is certainly not *omni exceptione major*, still it is not prohibited, and the Court, in applying it to the determination of the cause, exercises a legal discretion as to its effect. This will suffice to show why such evidence should be admitted; but it is not necessary to decide whether it is of itself sufficient in this case to sustain the libel, for there is other evidence tending to support the demand of the libellants.

The claimants next urge that the action is premature, the libel having been filed the day after the cargo was discharged, and before the expiration of the ten days limited by the act of Congress of July 20th, 1790. (1 *U. S. Stat. at Large*, 133.) It will be seen, however, that the same section of the act which withholds from a seaman the right to proceed for his wages until ten days have elapsed after the cargo is fully discharged at the last port of delivery, saves to him the right to an immediate action in case the vessel is about to proceed to sea before the expiration of the ten days; thus leaving him, in that case, the same right he would have under the general maritime law independent of the provisions of the act. The libel alleges, and the answer does not deny, that the vessel was about to proceed to sea forthwith. Admiralty process was, therefore, rightfully taken out, if the wages were due at the time.

I am, moreover, inclined to think, upon the evidence, that the master discharged the libellants, and it is very questionable whether a delay of ten days can be exacted

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where a seaman is absolutely discharged from the vessel. That terminates the contract, and takes away his claim for a continuance of wages, and it would seem but a just reciprocity to hold that the ship's term of credit is expired, when, by the act of the master, the seamen can no longer charge her with wages.

The claimants urge further, that the period of service stipulated in the shipping articles, which they produce in Court, was twelve months, instead of nine, as alleged by the libellants, and that it was also agreed that the wages should not be demandable previous to the expiration of the twelve months. This action was instituted a little more than eleven months after the voyage began. Outside of the articles, the evidence is very satisfactory, that the libellants shipped with the understanding that their engagement was for nine months only. If this fact rested upon the testimony of the libellants alone, that, though admissible, would be received with great distrust, since the men mutually establish each other's right of action, by swearing to the fact as applicable to the crew, without swearing to the act of each libellant by itself. But they are fully corroborated in the fact by the deposition of two seamen who were examined on the part of the claimants. All agree, that when they shipped and signed the articles, they engaged for only nine months; and Long, a witness who has no interest in this point, heard it so asserted on the voyage, in presence of the master, who did not contradict it.

The articles specify the term as twelve months, and that the wages shall not be demandable until the expiration of that time. But, according to the principles which prevail in Admiralty Courts, there is no difficulty

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in inquiring into the true terms of the contract, notwithstanding the written agreement. The act of July 20th, 1790, which enjoins upon the master to make his agreement with the seamen in writing, does not make the written agreement conclusive upon the seamen; neither do the Courts regard it as such, whatever effect it may have as to the master. Seamen have, in numerous cases, been permitted to prove that the shipping articles did not set forth correctly the agreement entered into by them; and the Court, without impeaching proofs, will hold to be void such agreements in the articles as are injurious to the seamen. (*The Juliana*, 2 Dod. 504; *The Minerva*, 1 Hagg. 347; *Harden v. Gordon*, 2 Mas. 541; *Abbott on Shipp. ed.* 1830, 435.)

In endeavoring to ascertain the true nature of the agreement made in this case, it is to be noticed that the articles themselves are calculated, on their face, to excite suspicion as to this particular stipulation. The body is in a common printed form, and manifestly the parts in writing have been, in some places, gone over a second time with a darker ink, so as to leave it difficult to say whether the words, as originally written, have been preserved, or whether new ones have been substituted. This indistinctness is particularly noticeable in the word *twelve*, before *months*, fixing the time of service. This circumstance alone would create so much doubt as to the integrity of the written agreement, that it ought not, unexplained, to outweigh the positive testimony of the libellants to the fact, even if they were not sustained by the two seamen produced on the part of the claimants, both of whom understood the agreement to be for nine months only.

The claimants offer the deposition of a witness resident

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in Maine, who swears that he filled up the blanks in the articles, and first used a pale ink, and afterwards a darker ink, and that he well recollects that the stipulation that the libellants should not demand their wages until the end of twelve months was inserted before they signed the articles. It is observable that this witness does not swear that the articles, as signed by the seamen, stipulated for a service of twelve months. The fact that he swears so precisely as to the *twelve* which limits the time for bringing the action, which is of the least importance, while he wholly omits any reference to the doubtful *twelve* which fixes the time of service, together with the appearance of the writing, is, independent of the other proofs, very impressive evidence that the blank was originally filled with the word *nine*. When and by what authority the word *twelve* was substituted, is not explained. It may be added, that the signatures of the libellants and of the witnesses are all in pale ink, and it would be singular if, after having written over the body of the contract in dark ink, because of the indistinctness of that first used, the parties should yet, at the moment of signing, have abandoned the dark ink, and have returned to the use of the pale. I am satisfied that the contract was written and signed with the pale ink, and that subsequently parts were written over with the dark ink, it may be, without the variation of a word. But, the transaction not being explained, the party setting up the contract must bear the consequences of the presumption of its having been altered after its execution without the consent of the other contracting party. This deposition is, moreover, not certified in conformity to the requirements of the 30th section of the act

of Congress of September 24th, 1789; (1 *U. S. Stat. at Large*, 88, 89; *Bell v. Morrison*, 1 *Pet.* 351;) and, though it has not been formally excepted to by the libellants for that cause, I should have felt constrained to exclude it for informality, had its evidence not stood contradicted and impeached by the evidence against the articles.

The defence that the libellants have deprived themselves of a right of action until the termination of the twelve months' credit stipulated, could not, even if proved, avail the claimants. An engagement written in shipping articles by a master, and subscribed by seamen, not to sue for their wages when due, and every other restriction of their legal rights, will be treated by maritime Courts as an imposition practised upon ignorant and improvident men, and, because of its manifest injustice, will not be enforced against them. It will be adjudged to be nugatory and void. So, also, the discharge of a seaman from a vessel by her master during the running of the shipping articles, will be held to be a surrender or release, *in toto*, of their obligation upon the man, because every duty imposed on him by the contract arises from, and is dependent upon, his legal connection with the vessel. When that is severed, his pay ceases; and the separation would also, almost universally, take from him, at any after period, the benefit secured to him by law for the recovery of his wages—that of a summary arrest of the vessel. The Courts are watchful in protecting him from vexatious delays and embarrassments in establishing his right to his hard earnings when withheld from him, and will see to it that he is not entangled and defeated in that, by sharp bargains imposed upon him by mas-

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ters or ship-brokers. If, then, the agreement in the present case, not to sue for their wages until three months after their services should be ended, was genuine on the part of the libellants, the Court would be compelled to reject it as a defence, and to regard it as having been obtained by imposition and deceit. On general principles, every engagement introduced into shipping articles outside of their appropriate end and purpose, should be held void as to the sailors, unless it is satisfactorily proved to have been clearly made known to them, and rests on considerations approved by the Court.

I think that in this case this action is well brought, and that the libellants are entitled to recover the wages demanded. A decree will accordingly be entered in their favor to that effect, with an order of reference to the clerk to compute and report the amount, making allowance to the claimants for all just credits.

Decree for libellants, with costs.

THE HILARITY.

A hypothecation of a vessel, in the form of a mortgage, as security for supplies furnished in a foreign port, may be enforced *in rem* in the Admiralty.

The lien created by such hypothecation is not lost by taking other security for the claim.

In regard to supplies furnished a domestic ship in her own port, Courts of Admiralty are governed by the law of the place, in determining whether a lien against the vessel exists for such supplies.

For this purpose, ports in different States of the United States are foreign to each other.

A material man cannot maintain an action *in personam* in Admiralty, where a note or other obligation has been taken for the demand.

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Either the owner or the master of a ship may bind her by a direct hypothecation, for repairs or supplies made or furnished in a foreign port, although a note or other obligation is given for the demand.

A hypothecation in the form of a mortgage is not a bottomry bond, where the creditor neither assumes the risk of a voyage nor reserves marine interest.

Seamen's wages take precedence of a hypothecation for supplies.

November 30th, 1829.

THIS was a libel *in rem* against the schooner Hilarity.

A hypothecation of the vessel was made by her owner in the port of Baltimore, in the form of a mortgage, as security to a material man, for supplies furnished her. The owner resided in the State of Delaware. A promissory note, at four months, was also taken for the same demand.

The vessel was now libelled on the mortgage as a bottomry bond.

A claim was interposed by an older mortgagee, and also by the seamen for their wages; and pleas were put in to the jurisdiction of the Court on two grounds:

1st. That the lien implied by law was destroyed by the party's taking other security for his claim, and that no direct lien could be created by mortgage, and be enforced in Admiralty;

2d. That the remedy upon the securities must be sought in the ordinary Courts of law alone.

Greenwood, for the libellant.

Blunt, for the claimants.

BETTS, J.—This case does not present the point whether material men have a lien, in the home port of the owner, against the vessel, without actual possession.

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It is now fully settled, that in respect to domestic ships in their own ports, the Courts of Admiralty must be governed by the law of the place. (*The General Smith*, 4 *Wheat.* 438, 439; *The St. Jago de Cuba*, 9 *Wheat.* 409; *The Zodiac*, 1 *Hagg.* 320, 325.) In those States where the rules of the civil law obtain, the lien would exist; but where the common law prevails, there would be no lien. But the question in this case is, whether a hypothecation of a vessel, by way of mortgage, can be enforced in the Courts of Admiralty. Baltimore being a foreign port in relation to the State of Delaware, it is well-settled that the lien would have been perfect, and that it might have been enforced in any maritime Court, if no assurance for payment had been taken by the material man. (*Abbott on Shipp.* 116 n.) The late decisions of the Supreme Court, which are quoted to establish a contrary doctrine, were cases of inquiry into the owner's liability *in personam* to material men. It was decided, that Courts of Admiralty would not sustain a suit *in personam*, for materials furnished a vessel, where a note of hand or other obligation had been taken for the demand. This would be upon the principle that a specific contract had been accepted in lieu of the implied obligation of the owner. The liability of the vessel was not in question.

It has been decided in this Court, on full argument, that the master may bind a vessel, by a direct hypothecation, for repairs in a foreign port, although he has also given the creditor a bill of exchange for the same demand. (*The William and Emmeline*, ante, p. 66.) The right of the master to hypothecate, results from the doctrine that he stands in the place of the owner. His powers, however, though never greater, are often

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less than those of the owner. Thus, the owner may pledge the vessel by bottomry for the purchase of cargo, (*The Mary*, 1 *Paine*, 671,) which the master cannot do.

In the present case, the libel articles upon the instrument of hypothecation as a bottomry bond, although it lacks the form and the essential requisites of that security. The creditor neither assumes the risk of a voyage nor reserves marine interest. But no special form of transaction is necessary to make an operative hypothecation. Any method which shows the intention of the parties, describes the subject matter, and confers adequate powers upon the pledgee, will make an empawning of property, which will be treated by the Courts as such, whether in the form of a mortgage or of a simple hypothecation. There is, therefore, no impediment to proceeding on this instrument as a mere hypothecation, although it might also have the effect of a mortgage.

There is nothing in the objection that this security can be enforced only by an action at common law. It is not necessary now to consider whether, in every case of a mortgage of a vessel, or of her equipments, a Court of Admiralty will enforce the contract *in rem*; for, the debt secured by the hypothecation in this case, having been contracted for supplies furnished a vessel in a foreign port, was indisputably within the jurisdiction of the Court, and that jurisdiction was not lost because the parties reduced to writing an admission of the indebtedness. I think, therefore, that the giving of the promissory note creates no impediment to the creditor's pursuing his primary lien in a Court of Admiralty against the vessel.

The question as to the order of payment between

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the two mortgages, is reserved for further consideration, after the money is brought into Court.

A decree of condemnation must be entered, and a reference be had to the clerk to state the amount of wages due to the seamen, and also the amount due on the respective mortgages. The wages will be first satisfied.

Decree accordingly.

THE TRIAL.

In a suit *in rem* for seamen's wages, the master is a competent witness for the libellant, though he may have executed a bill of sale of the vessel to the claimant.

The testimony of the master in such a case is, in the absence of the shipping articles, sufficient of itself to establish the time of each seaman's service, and the amount of wages due.

Under the 6th section of the act of July 20th, 1790, (1 *U. S. Stat. at Large*, 133,) in order that Admiralty process may issue within ten days after the arrival of the vessel, it is sufficient to show a reasonable ground of belief that the vessel is about to proceed to sea within the ten days.

The clerk's report, in matters referred to him, should state facts and conclusions, and not detail the evidence at length.

A neglect, at the trial, to object to the competency of evidence, is a waiver of the right to object to the same evidence on a subsequent reference to the clerk.

The right of a seaman to his wages depends on the service, and not on the shipping articles, and he is not obliged to call for them in order to establish his claim to wages, though he may do so.

If the State Court compensates services similar to those performed by a marshal, although not performed there by a like officer, the marshal is entitled to the same compensation.

The same fees are allowed to officers in this Court, as in the Supreme Court of the State, without regard to the source of the power of the State Court—whether customary or statutory.

This Court allows a reasonable compensation to its officers for services not enumerated in the fee-bill.

December, 1829, February, 1830, and May, 1830.

The Trial.

THIS was a libel *in rem* for wages, by Green, mate, and Anderson, steward, of the schooner Trial. Green had shipped in March, and Anderson in June. The schooner arrived in New-York on the 6th of August, the libellants were discharged on the 10th, their wages being unpaid, and this libel was filed on the 15th.

The claim and answer of Moses Davis and Martin Wood alleged, that on the 10th of August they became *bona fide* purchasers of the schooner, from Thomas Mister, master and owner, for \$850, without notice of the libellants' demands, and they produced a bill of sale from him, with covenants of warranty and against incumbrances. They also denied that the schooner was about to proceed to sea before the end of ten days next after the delivery of her cargo, and alleged that the libellants had not proceeded according to the form of the statute, to recover their wages. The statute referred to was the 6th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 133,) which provides, that if the seamen's wages are not paid within ten days after the voyage is ended and the cargo is discharged, the master may be summoned before the proper magistrate to show cause why process should not issue against the vessel, unless the vessel shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo, in which case the seamen shall be entitled to immediate process out of a Court of Admiralty.

The libellants put in as evidence the deposition of the master, Thomas Mister, and their own several depositions, each for the other. Objections were taken to the competency of all the witnesses. To prove that the vessel was about to proceed to sea before the end of the

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ten days mentioned in the statute, it was shown that on the day after the sale to the claimants she was removed from the East River some distance up the North River. Morris, a witness for the claimants, testified, on cross-examination, that the vessel was removed to keep her out of the way of her former captain and crew; that the claimant thought of taking her to Philadelphia; and that she might have been got ready for sea in twenty-four hours. There was also evidence going to show that the purchase by the claimants was fraudulent.

Edwin Burr, for the libellants.

George Sullivan, for the claimants.

BETTS, J.—The objections to the competency of the witnesses upon whose evidence the case rests, will be first considered.

In relation to the master, the general position is first taken, that a master cannot be a witness in behalf of seamen in a libel for wages, because he is one of the parties ultimately responsible to the seamen for their wages, and is thus interested to throw upon the vessel or her owners a charge which he might otherwise have to bear himself, and will be enabled to discharge his liability by his own testimony. Cases are referred to, decided by Judge Peters, in which the master was considered to be an incompetent witness in suits *in rem* by mariners for their wages. (*The Phoenix*, 1 Pet. Adm. Dec. 201; *Malone v. Bell*, Id. 139, 141; *Atkyns v. Burrows*, Id. 244, 245.) The reasoning of the Court is certainly expressed with great latitude in those cases, and it would seem to have been the impression of that

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learned judge, that a master could not be received as a witness in behalf of a seaman. In the cases referred to, however, the master was produced on the part of the owner against the mariner; and there is no doubt force in the suggestion, that under such circumstances the master stands interested, if not in a pecuniary point of view, at least by strong bias of mind, to defeat the action; though I am persuaded the weight of authority is against the conclusion of the Court, even upon that point, (*The Lady Ann*, *Edwards' R.* 235,) unless where he is called on to justify an act on board, for which, if unjustified, he would himself be responsible. (*The Exeter*, 2 *Rob.* 261.) However that may be, the objection does not apply where the master is offered as a witness by the seaman. It is difficult to perceive how the interest of the master can be promoted by the recovery of the mariner against the ship. The freight is the fund which ought to discharge wages, and that appropriately comes to the hands of the master, who will be liable to account to the owner for the freight and earnings of the vessel; but, in point of interest, it must be immaterial to him whether he pays the freight to the owner or to the sailor. The proofs do not show that there were no such earnings in this case, out of which these demands could have been satisfied; and the Court cannot intend that none existed. But, admitting that the master had no means of the owner with which he could have paid the wages, and that, accordingly, he may become responsible for them personally, if they cannot be obtained out of the vessel by this suit, that circumstance does not create the degree of interest which disqualifies him from being a witness. The interest is not direct and necessarily dependent upon the decree

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rendered in the cause, but consequential and contingent—that is, the master may be made ultimately liable for the wages, if they are not satisfied by this decree or by the owner, but the decree could not be enforced *in personam* against the master or the owner, nor would it furnish a foundation for an action against either. The only way, therefore, in which the master could be benefited, would be to have the claim certainly satisfied by the vessel. Should the wages yet remain unpaid, his responsibility *pro tanto* to the seamen would be neither discharged nor lessened by means of the decree. He may testify under a strong bias, which ought to be regarded in estimating his credit; but there is not that pecuniary and direct interest against the claimants which renders him an incompetent witness for the libellants. Indeed, his interest and bias would rather seem to be united in defeating the action, and in proving that the mariners had no existing claim against the vessel, the owners or himself.

The further objection to the competency of the master is, that he executed a bill of sale of the vessel to the claimants, with covenants of warranty and against incumbrances. It is accordingly insisted, that he cannot be permitted to impeach the title he conveyed, or to interrupt the peaceable enjoyment of the property in his vendees. It is supposed, that if his testimony subjects the vessel to a sale by force of this lien which existed at the time of the transfer, he will have violated his covenants, and, indeed, have committed a direct fraud, and stand exposed to an action by his grantees for the consequences. It is a sufficient reply to this objection, and to the reasoning in support of it, to observe, that the witness is called to testify by those whom it

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would be his more immediate interest, under such a state of things, to defeat. The claimants cannot object that the witness called by the libellants is strongly bound to support the defence and defeat the action. These arguments might prevent the claimants from calling their grantor or vendor, without giving him a release; but a party may always incur the hazard of taking the evidence of one who stands opposed to him in interest, and enlisted on the side of his adversary. The objections to the competency of the master cannot, therefore, be sustained. His testimony being sufficient to support the libellants' action, without the aid of their personal evidence, the case does not require a decision of the objection raised to their competency to testify for each other.

The claimants, in addition to their answer and claim, interpose a plea that, the suit was instituted within less than ten days after the arrival of the vessel in this port, that she was not about to proceed to sea within that time, and that the libellants did not, in pursuance of the statute, summon the master to show cause why process should not be issued against the vessel. A general replication is filed to this plea.

The evidence of the witness, Morris, is abundantly sufficient to establish, *prima facie*, the only material point at issue between these parties under the plea, namely, that the vessel was about to proceed to sea before the end of ten days after her voyage was ended at this port. Accordingly, the libellants were entitled to sue immediately in Admiralty, as their case came within the express exception of the statute, which prescribes, in ordinary cases, a different mode of procedure. To avail themselves of the exception, sailors are not bound

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to prove positively that the vessel was about to proceed to sea, before they can be remitted to their right of action under the general maritime law. This degree of evidence it may never be in their power to produce. The fact is commonly known only to the owners or to the master, the parties directly interested in concealing it. All, then, that can be exacted of the seamen is, to show a reasonable ground of belief that the vessel is about to go to sea. This may be gathered from concomitant circumstances as well as direct proofs.

Under the general maritime law, sailors could enforce their claims by an action as soon as the voyage was ended. The act of Congress was not designed to abridge the rights or remedies of sailors; but only, in cases free from all hazard to them, to have the owner and master notified that the wages must be paid, before the seamen can arrest the vessel, to afford a reasonable period to collect the freight and pay the wages without suit. The present case shows that there was reasonable cause to believe that a summons under the statute would have been nugatory and inefficacious towards obtaining the wages due, and that, on the contrary, it would have been the means of hastening the departure of the vessel out of the jurisdiction of the Court before proceedings could have been perfected for her arrest.

The right of action being established, and it appearing, *prima facie*, that wages are due to the libellants, I shall decree preliminarily in their favor, and order a reference to the clerk to ascertain and report to the Court the amounts due. On the reference, either party may produce further proofs in support or discharge of the demands.

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At a subsequent day, (February 16th, 1830,) the clerk, at the request of the counsel for both parties, reported the evidence given before him, and the exceptions taken, on the part of the claimants, to the proofs, and referred the matters of those exceptions to the Court for decision. The same objections were taken as before, and a further one, that the libellants had not produced the shipping articles, they being the best evidence of the contract of hiring.

BERRA, J.—This is not conformable to the regular course of practice. The duty of the clerk is not to report the evidence, but the facts, and his conclusions thereon. Either party may have relief against errors in the report, by taking exceptions to it, and thus bring under review the whole ground of the clerk's decisions. But, as the present mode of presenting the question seems to have been adopted in pursuance of the wishes of the parties, and as the whole matter may be as fairly and with less expense considered in this form, I shall not send the report back to have it framed according to the course of practice, but shall consider the points in the shape in which they are submitted by the parties.

The claimants' first exception is, that the libellants cannot substantiate their claim to wages without producing the shipping articles. The first and sixth sections of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 131, 133, 134,) require a shipping agreement to be executed between the master and the seamen, before proceeding on a voyage, and provide, that in case of dispute, it shall be incumbent on the master to produce the agreement, if required, otherwise its contents may be stated, and proof of the con-

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trary shall lie on the master. This prosecution is under the general maritime law, and not upon the provisions of any statute, and the practice of Courts of Admiralty is to govern the proceedings, when not regulated by positive law. The statute referred to, so far as it may be deemed to be declaratory of the general law, or to act upon the shipping contract, must be the rule of decision in the cause, whether invoked or not by either party. The master, under whom the libellants contracted, was called and examined by them as a witness. He stated the terms of the contract with the libellants, but was not required by either party to produce the shipping articles. On the hearing, no exception was taken to the competency of this evidence, and no offer to produce the articles, nor any demand that the libellants should do so, was made by the claimants. This would be deemed to be a waiver by the claimants of this species of proof, if they had a right to exact it from the libellants. If allowed to raise the objection, they should have done so at the trial, when the libellants might have been able to obtain the articles, or to show good reasons for not producing them. A party cannot be permitted to go to a final hearing without objecting to the competency of evidence, and to raise an objection to the proofs on a reference before the clerk. This would be a surprise upon his adversary, and would enable the party making the objection, to secure inequitable advantages thereby.

But no authority has been produced on the part of the claimants, and I am not aware of any doctrine of the law, which requires from the libellants the production of the shipping articles. In general acceptance, the shipping articles and log-book accompany

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the vessel as a part of her muniments. A change of owners or of master would not divest the vessel of the possession of those documents. In judgment of law, they are in the custody of the claimants. The foundation of the suit for wages is the hiring and service, and not the written contract; and, therefore, it is not required by the course of the Court, that the seaman should aver how the contract was made. That is matter of defence. So, also, if the articles show either that no right of action had accrued when the suit was instituted, or supply matter in bar of it, that must be made to appear by the claimants. And the rule seems to be clear, that in all cases where it is necessary that the written agreement with the seaman should be before the Court, the obligation is cast upon the master or owners to produce it. (*The George*, 1 *Hagg.* 168 n. ; *Abbott on Shipp.* 464.)

If the articles may be supposed to remain with the former master, it was the privilege, but not the duty, of the mariners to require their production before the clerk, and it was equally in the power of the claimants to call them into Court. It appears, in fact, by the clerk's report, that when the objection was raised, the libellants required the production of the articles, and the claimants answered, that they should not have been asked of them, but of the master, who was the libellants' witness. The objection on this point is overruled.

A decree must accordingly be entered, that after satisfying the costs out of the proceeds of the sale of the vessel, the libellants be paid their wages as reported due by the clerk.

A motion was subsequently (May 20th, 1830) made

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for the re-taxation of the marshal's bill of costs and disbursements. The following bill had been presented and taxed *ex parte* :

1. Attachment, notices and proclamations,	\$17 90
2. Marshal's custody fee, (102 days,) . .	153 00
3. Keeper's fee, (102 days,)	102 00
4. Serving vend. exp. and return, . . .	2 25
5. Dr. and copy inventory,	1 00
6. Wharfage,	40 31
7. Storage of sails,	5 00
8. Padlocks and fenders,	2 00
9. For transporting schooner from North Moore-st. to Whitehall,	10 00
10. Labor unbending sails, pumps, &c., . .	3 00
11. Storage of sails at Whitehall, : . . .	3 00
12. Dr. and copy costs and att'g on taxation,	1 25
Commissions on \$420,	10 50
	<hr/>
	\$351 21

BETTS, J.—The legality of most of the items taxed is now formally questioned, and it becomes necessary to decide upon the propriety of the charges, as well for the disposal of this particular case, as to settle the rate of allowance as a guide in future practice. The items objected to will be most conveniently considered under two heads—for services and for disbursements—Nos. 1, 2, 4, 5 and 12 falling under the former, and Nos. 3, 6, 7, 8, 9, 10 and 11 under the latter:

1. It is urged by counsel, that a marshal can receive no emolument for the execution of the duties of his office, unless it is given specifically by act of Congress. And it is further contended, that if, in the absence of all

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legislation upon the subject, a right to a reasonable compensation for services might be implied and be awarded by the Court; yet, inasmuch as the act of February 28th, 1799, (1 *U S. Stat. at Large*, 624,) has established fees to the marshal for various descriptions of service, it clearly imports that Congress intended that he should receive pay in the way of fees alone, and then only in the particulars designated in the act.

There would be force in this reasoning, if the provisions of the act went no further than to arrange a tariff of fees. But, after designating the specific fees the marshal shall be entitled to, a broader provision is added to the section, to this effect: "For all other services not herein enumerated, except as shall be hereafter provided, such fees and compensations as are allowed in the Supreme Court of the State where such services are rendered."

The intention of Congress to conform the proceedings in the Courts of the United States to those of the Courts in the particular State in which their functions were to be exercised, is most manifest throughout the organization of the judiciary system. It was obvious that the diversities of practice in the State Courts would call for the performance of duties by the marshals in execution of process of the United States, which could not be appropriately compensated by any specific rate of fees. Congress, therefore, in this general manner, incorporated the customs of the Supreme Court of each State into the fee bill of the Courts of the United States. It was supposed that in this mode the varying services made necessary by the course of proceedings in different States could be adequately provided for, without leaving the matter of compensation wholly at the dis-

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cretion of the Court. In most instances this will be found to be the case; yet, in others, as will appear from the bill of costs now under consideration, the Court will find no fixed rules to guide its allowances, but must determine them by analogy to the modes of compensation authorized in the State. Bearing in view these general considerations, I shall proceed to discuss the particular items objected to.

Item No. 1 embraces \$15 of disputed charges, \$2 90 only being allowed by statute for the service of an attachment and for three proclamations. The charge should have specified in detail the particulars of which it was composed, that the parties might be prepared to investigate their propriety. If the charge of "notices" in this item means the draft and copy of the notice of monition prepared for the printer, it cannot be allowed. This service, under our practice, is performed by the clerk, and not by the marshal, and is included in the taxation of the clerk's costs. The marshal is not furnished with the means of doing it with accuracy and precision. The notice rehearses the substance of the libel, and, as this must be on file before the warrant of attachment is made out, it is the most convenient course of practice, to require the clerk to prepare, at the time the writ issues, the proper notices, founded upon the libel and process, and corresponding with them.

If, however, it is made to appear that the marshal has necessarily furnished any further written copies of the notice, he may, in my opinion, be compensated therefor, under the clause of the act referred to, at the rate paid attorneys, &c., for copies. The statute directs the compensation of the marshal for certain services to be governed by the allowance made by the Supreme

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Court of the State. But it does not require that the like services shall be performed in the State by a sheriff or other officer corresponding to the marshal. He will be entitled to the allowance, though, according to the State practice, the services are rendered by an attorney or clerk. In my opinion, the fee for serving the attachment does not cover this service or disbursement. The attachment is served when the property is seized. The fee is then earned, and, strictly speaking, the duty of the marshal in regard to the subject is all performed. When the proceedings are *in rem*, the arrest of the property and the citation of those in possession are simultaneous acts. (2 *Browne's Civ. and Adm. Law*, 178, 179.) Our practice, however, requires ulterior steps to be taken, and notice to be given by publication. This is not a part of the duty of the marshal in perfecting the arrest, and might, with equal fitness, have been assigned to the proctor, of the propriety of the allowance of the fee to whom no doubt could exist.

Item No. 2 is wholly objected to. No such item is inserted in the act of Congress fixing the marshal's compensation, and, as a previous statute had made provision for the service when the vessel had been seized by any officer of the revenue, it is argued that Congress did not mean to give any other fees for it in private suits, than those for the arrest, and for poundage in case of sale under execution.

There would seem to be a manifest incongruity in such a regulation, as the hazard and responsibility upon the marshal are the same in both cases; and it would be strange if he could, in addition to fees for serving the attachment, be compensated for the custody of a vessel pending a public prosecution for a violation of the

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revenue laws, and yet be obliged to bear all the risk himself when the action against her is in behalf of individuals. This is not the usual policy of the law. The government rarely imposes upon itself a heavier burthen of costs than is to be borne by private suitors; and it would require some unequivocal indication of such an intent, to induce the Court to conclude that Congress designed a discrimination of that kind in these cases.

The safe keeping of the vessel is wholly extrinsic and independent of the service of the attachment. The execution of the process transfers the possession to the marshal. But, whether the vessel is to remain, during the litigation, at his risk, or at that of the parties in interest, must depend upon the law of the Court in which the proceedings are had. If the arrest of the vessel were regarded merely as a citation of the parties in interest, there could be no foundation for a claim to custody fees, because the responsibility of the officer would cease on the due execution of the summons. That, however, is not the course of Admiralty Courts in this country. They continue the liability of the marshal for the safe keeping of the vessel until she is bonded, or to final decree. There is, accordingly, the most manifest propriety in awarding compensation on this account, if the service can be considered as embraced within the provision adverted to. To give application to that provision, however, it is not only necessary that the service should in itself be of a character meriting compensation, but also that it should be one that would, if rendered by a sheriff, have a compensation allowed for it by the Supreme Court of the State.

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On examining the laws of the State in force when the act of Congress was passed, or when this vessel was seized, it does not appear that fees were provided for services of this description. It is not consonant to the usual course of practice of the State Courts to arrest property in the first instance; and, where it was allowed in special cases, the law was either silent as to the compensation of the sheriff, or referred the matter to the discretion of the judge who authorized the proceedings. This was so with regard to attachments against the property of absent or absconding debtors. (2 *R. L. of N. Y.* 20.) But the act empowering material men, &c., to arrest vessels, made no provision on the subject. The recent Revised Statutes have supplied the omission; but the services in this case were performed before those statutes went into operation, even if they could properly affect the case, and our inquiries must be guided by the rule provided by the act of Congress of 1799. That act ought not, perhaps, to be understood as referring to the statutes of the State, except in so far as they furnish rules to the respective Supreme Courts. The fees allowed in the Supreme Court of a State, without regard to the source of its power, supply the rule of allowance in the Courts of the United States.

The remarks heretofore offered upon item No. 1, show that, in the estimation of the Court, if the services performed by a marshal are compensated by the State Court, though not performed there by a sheriff, the marshal is entitled to that compensation in this Court. The Court would award him the compensation for duties imposed upon him by its own system of procedure, though in the State Courts a constable

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might be charged with the like service, and might receive the fees. Neither, in my opinion, is the act to be limited in its provisions to the case of services identically the same in the two Courts. The plain principle of the act is, to adopt the State mode of compensation, in certain instances, and apply it to services rendered by the marshal. If the State Court employs no other means for compensating its officers than by applying to the case the table of fees for enumerated services, and leaves those cases unrewarded which do not fall within the tariff, this Court would undoubtedly be compelled also to deny to the marshal compensation in cases not expressly provided for by the legislation of Congress or of the State. But, when the Supreme Court of the State grants an appropriate compensation to all its officers for services imposed on them by its mandate, or by the course of its practice, though no provision in that behalf is made by statute, the act of Congress of 1799 ought to be construed to embrace the same principle, and to afford this Court a like means of compensating its officers. It would thus follow, that for duties necessarily devolved upon a marshal, the Court might secure him a compensation, though no services precisely like them were performed by State officers. The principle is indisputably established in the State Court, that when the law is silent as to charges for particular services, the Court will allow the officer what is deemed a reasonable compensation; (*Smith v. Birdsall*, 9 *Johns.* 328; *Bryan v. Seely*, 13 *Johns.* 123;) and this is done under the incidental powers of the Court, in cases where no discretion is conferred by statute. This Court feels itself supported by the act of Congress, in exercising that power in

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cases like the present. A reasonable allowance will accordingly be made to the marshal as a custody fee in this cause.

After the recognition of this rule, the next consideration is, the manner in which it is to be carried into execution. It is supposed that the Court ought to institute an inquiry into the circumstances of each case, and determine judicially the compensation, upon the proofs before it. The tendency of leaving the subject thus indeterminate, would be to lead parties into discussions and tedious investigations in the adjustment of every charge, and, in the end, the most satisfactory mode of disposing of the controversies would be to conform to some common rate of allowance. This rate should be a moderate but fair average, neither giving the marshal the ample emolument which some cases might justify, nor stinting him to the limited allowance which it might be convenient for all to pay.

The 4th section of the act of May 8th, 1792, (1 *U. S. Stat. at Large*, 277,) provides, that the marshal shall have the custody of all vessels and goods seized by any officer of the revenue, and shall be allowed such compensation therefor as the Court may judge reasonable. The practice under this law, from the earliest organization of this Court, is understood to have been to allow the marshal, on the seizure of a vessel, a custody fee of \$1 50 per day. I have adopted that as a reasonable allowance, since I have presided in the Court; and, as it appeared to me manifestly proper that one rule of compensation should be observed in cases alike in all respects, I have applied that rule in private suits also. This, in some instances, may afford a large compensation, but in

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others it will be exceedingly trivial, compared with the hazard and responsibility incurred by the marshal. I shall not depart from the general rate in this instance, and shall tax the custody fee at \$1 50 per day. There can rarely be occasion for complaint because of this charge. The claimant can always relieve his property by bonding it, and the libellant can prevent the accumulating costs from destroying his remedy upon the property, by speeding his prosecution. The procedure upon the Admiralty side of the Court may be so accelerated that a diligent suitor need never suffer by delays. A very few days will be sufficient for him to obtain his final decree, if he chooses to urge it.

Item No. 5 cannot be allowed. An inventory for the sale of property under execution is not necessarily prepared by the marshal. If any of the parties consider it advantageous to have one, it must be provided at the expense of those who desire it.

Item No. 12 will be allowed. The marshal is compelled to have his costs taxed, and he must accordingly draw out a bill and attend on taxation. He may also charge for a copy, when the proceedings in the cause have rendered it necessary that he should serve a copy on either party. This will hereafter always be so. A general rule will be promulgated, that the marshal, in all cases, serve a copy of his costs on the proctors of the parties, with notice of taxation.

2. The decision of the Supreme Court of this State, in *Smith v. Birdsall*, (9 Johns. 328,) shows that an officer will be reimbursed his expenditures incurred in performing duties imposed on him by authority of law, when no general compensation is provided which must be held to be intended to cover all charges. It is, how-

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ever, contended, that if these views are correct in general, and would justify the payment of the charges of material men, wharfage, &c., they ought not to cover a claim for publishing notice of the monition and for a keeper's fee.

Item No. 1 embraces the printer's bill, and, as it has already been shown that this publication was not the service of the attachment, nor a duty necessarily to be performed before the process could be said to be executed, but was outside of that duty, and a matter regulated by the practice of the Court, it follows that the charge is not embraced in the enumerated fees, and should now be allowed as a disbursement. The bill, however, ought to specify how much was paid, and the proper vouchers should be produced to support the charge.

Item No. 3 falls properly under the head of disbursements. The \$1 50 per day allowed the marshal will not be a reasonable compensation for his risk and responsibility, and be also sufficient to provide a keeper, when the safety of the property requires that one should be actually in charge of it. A moderate compensation will therefore be allowed, where a keeper is necessarily employed, but great caution will be observed that this charge shall not lead to abuses. It is in no way to be a masked fee to the marshal or his officers. It is passed as an expenditure, and, before it is allowed, it must be made to appear satisfactorily to the Court that a prudent precaution in regard to the interests of all concerned in the property justified the marshal in placing a keeper over it, that the keeper actually continued in charge of it for the time specified, and that the price paid was no more than reasonable for the services rendered.

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The other charges for expenditures and disbursements will be allowed on proof, if required by the parties in interest, that the services or supplies charged were authorized by the marshal, that in his judgment they were necessary for the safety of the vessel, and that the charges are reasonable and have been actually paid as charged. The proof may be upon the affidavit of the marshal or other deposition, at his option.

A re-taxation of the bill of costs is ordered in conformity to these principles.

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The acts of April 18th, 1818, and May 15th, 1820, (*8 U. S. Stat. at Large*, 482, 602,) which provide that the ports of the United States shall be closed against every British vessel coming from a port closed against vessels of the United States, and that every vessel so excluded, which shall enter a port of the United States, shall be forfeited, applies only to a voluntary entry by the act of the owner or master of the vessel, or of their agents.

An entry by a derelict vessel, brought in by salvors, without the consent of her owner or master, or of their agents, does not work her forfeiture under those acts.

A suit cannot be sustained in Admiralty *in rem*, to enforce the payment of duties to the United States.

Goods saved from a wreck and brought within the United States, are subject to import duties, under the acts of Congress of April 20th, 1818, and March 1st, 1823. (*8 U. S. Stat. at Large*, 483, 729.)

Whether they would be so at common law, *quære*.

The nature of salvage considered, and the principles regulating its amount enumerated.

The practice of calling in seafaring men to assist the judgment of the Court, has never been sanctioned in this country.

The rate of salvage in cases of derelict is seldom more than one-half of the net proceeds of the property saved. Two-thirds of the whole proceeds have sometimes been allowed, but the whole proceeds are never allowed unless their amount is so small that less would be an inadequate compensation.

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In awarding salvage upon a foreign vessel, Courts in this country will regard the rates of allowance in the Courts of the owner's country.

Import duties upon wrecked property are to be paid out of the gross proceeds, before deducting salvage, and are not to be charged exclusively on the owner's share of the salvage.

The relative claims of the actual salvors, and of the owners of the salving vessel and of its cargo, considered.

The duties of a master and of his crew in relation to saving derelict property, considered.

In this case, two-thirds of the proceeds of the property saved, after deducting the import duties, was given to the salvors. Two-thirds of the salvage was awarded to the owners of the salving vessel and of its cargo, and the remaining one-third was divided equally among the salvors, the master receiving no more than was received by each of the crew, and by a passenger who did duty as a sailor. Costs were decreed out of the proceeds in Court, after deducting salvage.

February, 1830.

THE ship Waterloo, of London, was discovered, on the 27th of August, 1828, by the brig Merced, in latitude 34° N., longitude 75° W., abandoned at sea. The Merced was bound from Havana to Cadiz, but, leaving her course, she, with great difficulty and danger, towed the Waterloo into the harbor of New-York, where they arrived on the 12th of September. The ship and cargo were thereupon libelled, on the 16th of September, by Peter Harmony, the owner, and Eliphalet Kingsbury, the master, of the brig, in behalf of themselves and of all others concerned, to secure the payment of salvage.

Against this libel, three claims and answers were interposed. The first was by the District Attorney of the United States, and claimed that the ship was forfeited to the United States, under the 1st section of the act of April 18th, 1818, (3 *U. S. Stat. at Large*, 432,) which enacts, that from and after the 30th day of September, (1818,) the ports of the United States shall be and remain closed against every vessel owned,

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wholly or in part, by a subject or subjects of his Britannic Majesty, coming or arriving from any port or place in a colony or territory of his Britannic Majesty, that is or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and, that every such vessel, so excluded from the ports of the United States, that shall enter or attempt to enter the same in violation of the act, shall, with her tackle, apparel and furniture, together with her cargo on board such vessel, be forfeited to the United States. The answer alleged, that the *Waterloo* was owned by British subjects, and came from a port that was, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States, to wit, from Annatto Bay, in Jamaica, and entered the harbor of New-York in violation of the act, whereby she, her tackle, &c., and cargo became forfeited to the United States. The answer also claimed, that if the *Waterloo* and her cargo were not forfeited for the cause above stated, her cargo was subject to duties, and prayed a decree accordingly.

The second claim and answer were interposed by the British Vice-Consul, in behalf of the unknown owners, praying a sale of the vessel and cargo, and that the proceeds, after payment of salvage to the libellants, might be decreed to be paid to the claimant.

The third claim and answer were interposed by George and Henry Barclay, as agents for the underwriters at Lloyd's, in London, and for insurers at Liverpool and Glasgow, in behalf of whomsoever of their principals it might concern, praying that the balance of the proceeds of the sale of the ship and cargo, after deducting salvage, &c., might be detained by the Court

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a reasonable time, until the rights of their principals could be ascertained. They also alleged that they had bonded the duties, and paid charges and expenses, and prayed that they might be decreed to be paid out of the proceeds.

On the 6th of October, a *venditioni exponas* was issued to the marshal, returnable on the 19th. The ship and her cargo were sold for \$39,262 19, which sum was deposited in Court.

On the 15th of October, a second libel was filed by the District Attorney against the ship, and also an information against her cargo, claiming a forfeiture of the same for a violation of the act of April 18th, 1818, and of the supplementary act of May 15th, 1820. (3 *U. S. Stat. at Large*, 432, 602.) Separate claims and answers were filed by all the other parties, denying that any forfeiture was incurred, and alleging the substance of their former pleadings.

On the 11th of November, by the consent of all parties, an order issued to the marshal to pay to the collector the duties upon the ship and cargo, amounting to nearly \$22,000.

The evidence in the case consisted of the depositions of the crew of the *Merced*, and of Captain Driscoll, master of the *Orient*, who had boarded the *Waterloo* before the *Merced* came up, but abandoned her, thinking it impossible to get her into any port. He stated that Bermuda was the nearest place, but that it would have been about as hazardous to have taken the *Waterloo* there, as it was to take her to New-York. The difficulty and danger of reaching New-York with her were described by the crew of the *Merced* to have been very great. The other facts in the case are sufficiently set forth in the opinion of the Court.

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James A. Hamilton, (*District Attorney*,) for the United States.

Francis B. Cutting, for Kingsbury.

David B. Ogden, for Harmony.

William Betts, for the Barclays.

Hamilton Wilkes, for the British Vice-Consul.

BETTS, J.—The two claims of the United States, first to a forfeiture of the ship and of her cargo, or secondly, to a satisfaction of the duties charged upon them, will be first disposed of.

The argument on the part of the United States is, that the ship and her cargo being British property, and coming last from a port closed to the United States, their entry here is made against the direct terms of the statute, and that, as Congress have not made an exception of any description of cases, this property must incur the forfeiture declared by the act. The Court cannot accede to this interpretation and application of the statute. There are certain principles inherent in penal legislation, which necessarily qualify or restrain its enactments, whether they are expressed in terms or not. When the violation of a law is supposed, it is always intended that there is a free agent, acting voluntarily. Courts will, accordingly, in the construction and execution of penal laws, supply those exceptions or qualifications which are presumed to be within the contemplation of the legislature as always accompanying such enactments. (*The William Gray*, 1 *Paine*, 16;

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Sheppard v. Gosnold, Vaugh. R. 159, 169; *Reeves on Shipping*, 203 to 207.) Although, therefore, the entry of the vessel and of her cargo are interdicted, and the forfeiture is imposed upon both, yet this form of enactment is to be understood to signify a voluntary navigation of the ship into our waters. Any other construction would lead to the revolting conclusion, that a vessel and cargo cast as wrecks upon our shores, might nevertheless be forfeited for sheltering themselves in a port closed against them by the policy of trade. This would be to constitute a man's calamities his offence, and to convert the acts of God into causes of punishment and confiscation.

It is, however, contended, that if the statute has regard to voluntary entries, that made by the Waterloo in this case was entirely so; and that nothing can excuse her having been brought into a port of the United States, unless she is shown to have been brought there from absolute necessity. The proofs undoubtedly show that, in the state of the wind, New-York was the most convenient port to make with the wreck. But Bermuda was much nearer, and it is by no means evident that any greater hazard would have been encountered in taking her to that island. New-York was clearly the port of choice, and not of necessity, as it was determined to bring the wreck here when she was taken possession of, many hundred miles distant; and, if a port strictly of necessity had been sought, no doubt the effort would have been made to run into Norfolk, or even Bermuda. Under these circumstances, it is insisted, that if a case of urgent and compulsive necessity might have protected the entry, no such case existed, and that bringing this vessel and her cargo here must

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be taken to have been a voluntary and designed importation. There is force in these suggestions, and they would undoubtedly be conclusive if the original ship's company of the *Waterloo*, or any person entitled to represent her owners, had concurred in the act. But it is to be borne in mind, that the *Waterloo*, when found, was deserted by her crew, and was brought into the United States by the salvors, at their own instance, without the concurrence or knowledge of the owners or of their agents. To condemn the vessel for this cause, would be to render the owners responsible for the acts of others having no authority under or connection with them. The Supreme Court have repudiated, in strong language, a construction of our revenue laws which would thus punish one man for the offences of another, over whom he could have no control. (*Peisch v. Ware*, 4 *Cranch*, 347, 365.) The doctrine is carried out and applied, in a variety of instances, to the exemption of property which would be forfeited if it had been placed in the predicament in which it is found, by the act of those who were entrusted with it by the owner, or who would have to bear themselves the consequences of their own misconduct. (*The Bello Corrunnes*, 6 *Wheat.* 152; 651 *Chests of Tea v. The United States*, 1 *Paine*, 499; *S. C.* 12 *Wheat.* 486.) With regard to the owner of the ship and cargo, it would, therefore, make no difference whether they were navigated into an inhibited port as derelicts, by strangers and salvors, or were cast upon our coasts by tempests and saved as wrecks from the sea. The law of confiscation and forfeiture would not touch them in either case.

Neither can a suit be sustained in the Court of Admiralty against the ship, or an information against her

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cargo, to enforce the payment of duties, (*The United States v. 350 Chests of Tea*, 12 *Wheat.* 486,) because the jurisdiction of this Court *in rem*, in revenue cases, embraces only seizures for forfeitures under the laws of impost, navigation and trade, as conferred by the 9th section of the Judiciary Act of 1789, (1 *U. S. Stat. at Large*, 76.)

The prosecutions on the part of the United States are accordingly both dismissed.

The question was raised and discussed at large by all parties, whether this cargo was subject to duties. In strictness of law, they were concluded upon this point. The parties had directly or impliedly assented to the order previously made in the case by the Court, by which payment of those duties was directed, and such assent would undoubtedly preclude them from afterwards calling in question the correctness of the decree. (*The Brig Concord*, 9 *Cranch*, 387.) Still, as it may be desirable to the parties to review on appeal all the proceedings in this Court, and to be put in possession of the views which have governed its decisions, and, as no formal opinion was delivered when that order was made, it may be proper, at this time, to state summarily the reasons which influenced that decision.

No doubt, according to the construction of the English laws of impost, wrecked property was originally exempted from the payment of duties. (1 *Molloy*, 392; *Sheppard v. Gosnold*, *Vaugh. R.* 159, 164; *Com. Dig. Trade*, C. 3.) This was upon the common law notion, that wrecked property belonged to the King, and that the King was not chargeable with customs, as they were, in supposition of law, paid to himself, and

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he would not take a small part, by way of duty, out of that which was all his own. (1 *Molloy*, 392.) Lord Ch. J. Vaughan further suggests, that goods cast upon shore as wreck could not be deemed to be imported as merchandise, and to be embraced by the statutes relative to customs. (*Sheppard v. Gosnold*, *Vaugh. R.* 159, 164.) This consideration influenced the decision of the King's Bench, in *Courtney v. Bower*, (1 *Ld. Raym.* 501,) and, no doubt, in a degree, led to some of the suggestions thrown out by the Court in *Peisch v. Ware*, (4 *Cranch*, 347.) Whether the decisions in England should not be limited to cases of wreck at common law, where the goods are thrown on shore by the sea, would only become a material inquiry in case we were to be governed in this matter by the common law rule. The statute of 5 Geo. I. ch. 11, has since placed wrecked goods, in respect to duties, upon the same footing with goods regularly imported, and I think that the acts of Congress substantially accomplish the same end here.

Judge Winchester, who has left behind him a high reputation as a learned and discerning judge, very distinctly intimates his opinion, that goods saved from a wreck at sea, and imported into this country, are not chargeable with duties. (*Mason v. The Ship Blaireau*, 2 *Cranch*, 240; *Peisch v. Ware*, 4 *Id.* 354 n.) The Courts above, in reviewing his decision in the case of *The Blaireau*, did not touch that particular point. The proposition was advanced *arguendo* by counsel in the subsequent case of *Peisch v. Ware*, (4 *Cranch*, 347,) but the decision of that case did not necessarily lead to the consideration of the general proposition, and it was not adverted to by the Court. The Court decided,

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that goods wrecked and brought into our ports are not liable to forfeiture for not having been regularly entered in conformity to the revenue laws. Manifestly, it might often be impossible for strangers bringing property in, as wreck, to comply with the requisitions of the custom-house in making a regular and perfect entry of the goods; and, therefore, it would be a most harsh application of the provisions of those laws, to condemn the property for that cause. Whether, if the question rested upon the construction of the revenue laws, the principle would not extend further, and exempt such property from liability to duties, I do not think it indispensable now to determine, as, in my judgment, the 15th section of the act of April 20th, 1818, (3 *U. S. Stat. at Large*, 437,) reënacted by the 21st section of the act of March 1st, 1823, (3 *U. S. Stat. at Large*, 736,) removes the formal difficulty of making entry, and places goods saved from wreck upon the same footing as if imported in a regular course of trade. By providing that before goods taken from a wreck shall be admitted to entry, they shall be appraised, the manifest implication of the act is, that they are to pay duties; and, without pursuing the discussion upon general principles, which, in my opinion, would lead to the same conclusion, I shall declare that this ship and her cargo have been rightfully charged with duties. If there is a seeming harshness in drawing a revenue from property so situated, either in respect to the English owner or to the salvors, it is worthy of remembrance that a like rule would be applied to American property taken under similar circumstances into a British port. (*Pope's Mercht. Guide*, 82, 338.)

The inquiry next in order is the amount of compen-

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sation to be awarded to the salvors. There is no evidence before the Court that the owner of the *Merced* is not also owner of her entire cargo. In the distribution of salvage money, he will be treated as such. The salvors, then, as between themselves, will stand in two classes: 1st. The owner of the *Merced*; 2d. Her master and crew. Although these parties unite in the action against the ship and her cargo, and have a common interest in the amount to be recovered, yet, in the ultimate division of that amount, their interests are separate, if not hostile, to each other.

The main question is, how much salvage shall be allowed? It is obvious that the vicissitudes of nautical pursuits must have brought this inquiry frequently before the Courts. It has been the subject of adjudication from the earliest history of juridical proceedings. But, as each case comes clothed with variant circumstances, it has been thought impracticable to establish general rules which may with justness be applied to all cases. The want of fixed principles of compensation is the source of serious perplexity to Courts and of uncertainty to parties in interest. There are marked fluctuations in allowances, where the cases would seem to require no discrimination. This occurs not only between different tribunals, but the books supply us many instances in which enlightened and cautious judges will reward, at one time, with a liberal hand, services which, at another, are compensated sparingly. These diversities arise from the effort of the law to have each cause, in salvage claims, disposed of upon its own particular merits, and, with this view, the whole matter is referred to the discretion of the Court which acts in the cause. Yet, probably, nowhere can

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judicial discretion be less intelligently and satisfactorily exercised than in matters of salvage. The judge must weigh facts, and estimate probabilities, of the true import or bearing of which he will generally, from his education and pursuits in life, be less competent to form correct opinions than in almost any other branch of his duties. This would be so, if he could be an eye-witness to every occurrence in the case, as he could but imperfectly estimate risks and services so foreign from his own habits and experience. He has not, however, the satisfaction of knowing that he is called upon to judge of facts as they actually occurred. He must gather the information on which he acts from those who have every inducement to conceal or discolor parts of the transaction, and who would be usually restrained by no fear of contradiction or exposure. Inflamed representations of perils and sufferings must accordingly be expected, particularly when addressed to one who would rather be inclined to apprehend dangers in situations and exposures with which he is not familiar, and thus to liberally value services devoted to the rescue of property in that condition. The English Court of Admiralty has endeavored to obviate this pressing inconvenience by calling to its aid seafaring men, who can properly appreciate the facts presented, and advise the Court to such judgment as the nature of the case may require. This mode of procedure has never been sanctioned in this country.

There are, however, certain general considerations which enter into the estimate made by Courts of the services to be rewarded—as, 1st. The situation of the salvors, and their conduct and exposures; and with these is properly connected a regard to the value

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of the ship and cargo employed by them in effecting the salvage; 2d. The situation of the property saved, and the probabilities of its preservation without the assistance of the salvors; and 3d. A liberal public policy, which, on the one hand, holds out encouragements to mariners to aid in the preservation of property, by securing to them generous rewards, and, on the other, exercises a jealous and vigilant protection over the ship-owner and merchant, to shield them from exorbitant demands. It is through influences so important and conflicting that Courts are to ascertain and settle the rate of reward, without having any more definite criterion fixed by the law to guide and correct their deliberations. There can be no surprise, therefore, at the different results to which men of equal justness of purpose arrive, nor that the books should abound with cases filled with learning on this subject, yet leading to no plain, practical results. It is unnecessary to rehearse the doctrines that have been advanced and the decisions that have been made, as they do not profess to fix an exact standard or measure of compensation, or to do more than offer suggestions and arguments which may be usefully consulted in future cases. The English and American authorities, which discuss this topic most instructively, are collected in Judge Story's late edition of *Abbott on Shipping*.

The tendency of a preponderance of the decisions is, manifestly, to consider one-half of the nett proceeds the *ultimatum* of salvage to be allowed in cases of derelict. (*L'Esperance*, 1 *Dod.* 46, 49; *Rowe v. Brig* —, 1 *Mas.* 372; *Concklin v. The Harmony*, 1 *Peters' Adm. Dec.* 34 n; *Morehouse v. The Jefferson*, *Id.* 46 n.) Still, two-thirds of the whole proceeds have been al-

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lowed. (*The Jonge Bastiaan*, 5 Rob. 287.) And the decisions of the English Admiralty will have more consideration in the present case, as our Courts, in awarding salvage for the preservation of the property of foreigners, have regard to the rates of allowance which obtain in the Courts of the owner's country, it being the policy of our tribunals to observe, in this respect, a rule of reciprocity. (*Armroyd v. Williams*, 2 Wash. C. C. R. 508; *Mason v. The Ship Blaireau*, 2 Cranch, 240.) The claims of the libellants in this case, if allowed, would absorb the whole proceeds of the ship and cargo. This the Courts will not sanction, except in cases where the property saved is so small in value as to be necessarily all required to cover charges and make any compensation to the salvors.

The doctrine of salvage derives its support from the consideration, that however munificent the reward may be to the salvor, something, a *residuum*, is still secured to the owner. His rights are not to be deemed derelict. One of the most satisfactory reasons for allowing a discretion to the Courts in this respect is, that they can reward not only according to the merit of the services, but also in proportion to the amount saved. I have met with no instance in which the whole amount saved, and an amount equal to what was preserved in this case, has been all of it taken from the owner. Courts, in so doing, would be reinstating the rule of nature, or rather of barbarism, in devoting to the first finder whatever property the exigencies of the owner had wrested from him or compelled him to desert.

The main effort of the libellants' counsel has been to throw the whole of the duties on the owners, and

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leave the salvors the same degree of compensation that would be allowed if the gross proceeds of the property represented its nett avails. Without pursuing the train of reasoning which has satisfied my mind that there is no just ground for exonerating the salvors from sharing in the charge of duties, it will be enough to say, that nothing more can be considered saved in this case, out of which the salvors may be rewarded, than what remains after satisfaction of the duties. Whether that proportion goes to the government, as the price for the enjoyment of the salvaged property, or perishes at sea, the residue is all that the exertions of the salvors have placed at the disposition of the Court. (*Concklin v. The Harmony*, 1 Pet. Adm. Dec. 34 n, 43 n.)¹

The duties were nearly \$22,000, which exceeded one-half of the gross proceeds of the ship and cargo. The remainder composes the sum which is now to be distributed between the salvors and the owners. The Court has no doubt that the owners should be required to disburse a large proportion of this. In respect to them, the salvage was of the most meritorious order. Independent of the evidence of the salvors, the testimony is full and satisfactory, that the Waterloo, when fallen in with, was in the most perilous situation. Captain Driscoll thought that any attempt to save her would be hopeless. She lay in a rough sea, at a great

¹ In *The Jubilee*, decided in 1826, but not reported until 1840, (8 Hagg. 43 n.) in a very meritorious case, the Court awarded two-thirds as salvage, and ordered sufficient property to be sold to pay salvage and expenses, duty free. But a sale of cargo, duty free, in respect to salvage, is no longer allowed. (4 and 5 William IV. c. 89, § 4.) It would seem, therefore, that salvors would now pay duties on their share, or, which is the same thing, that salvage would be awarded out of what remains after duties on the gross amount are paid.

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distance from any port, nearly dismantled. It was scarcely possible to board her, on account of the noxious and stifling air in her hold and cabin. She was rapidly sinking, having then made about twelve feet of water, and the wind at the time was blowing heavily. The crew had abandoned the wreck three days before, as being then in a desperate condition, and, no doubt, but for the intervention of the salvors, the vessel and her cargo would all have perished in a very few hours. This, therefore, as it respects the owners, shows that their property was rescued from dangers which must immediately have been fatal to it, and against which no premium short of its value would have obtained for them an indemnity. Nor could this have been done without great exposure, and the most energetic exertions on the part of the salvors. These circumstances—the desperate situation of property, and the personal danger incurred by the salvors—are always recognised as demanding a liberal award of salvage. Admitting the perils and intrepidity of the ship's crew to be extravagantly exaggerated, in the relation given by themselves, yet there is extrinsic evidence enough to satisfy the Court that the wreck could not have been brought into port without uncommon exertions and perseverance and no small degree of hazard to their lives. The Waterloo was not in a condition to be navigated by herself, nor could the Merced, with safety, have spared hands enough to man her. Cables were accordingly passed to her from the Merced, and she was towed in, a sufficient number of men being put on board to work the pumps, and do the labor indispensably necessary to keep the wreck afloat. This, it is stated, is always a dangerous proceeding, and, in vessels of the relative

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size of these, (the Waterloo being about double the burthen of the Merced,) must be attended with the most imminent risk. When Captain Driscoll, of the Orient, parted company with them, the wind was high and squally, and from fourteen to fifteen days were consumed before the wreck made land. Connecting with these facts the relation given by all the libellants, on their examination, that the weather continued tempestuous during the whole time, and that they encountered three severe storms, and it must be manifest that efforts of dauntless courage and constancy must have been put forth to secure this property. There is, then, a manifest propriety in charging the owners liberally, in proportion to the value so rescued; and I shall decree that two-thirds of the gross amount, after the deduction of duties, be paid to the salvors.

The manner in which this sum shall be distributed between the owner of the Merced and her master and crew, will next be investigated. Upon this branch of the case the testimony of the libellants may be received with less distrust, for, in so far as it proves that unceasing and extraordinary exertions were necessary on their part to save their own vessel and the wreck, it magnifies, in the same proportion, the importance of the Merced to the success of the enterprise. The toil and the peril were the crew's, but they had nothing else in jeopardy. The owner of the Merced had in risk upon the adventure a vessel and cargo, worth nearly double the wreck and her cargo, and that vessel was the essential instrument by which the salvage was made, and without which, in the crippled condition of the Waterloo, it could not have been effected. In this point of view, the claims of the respective parties upon

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the fund would seem to stand nearly *in equilibrio*; and probably the master and crew would accede to the propriety of an equal division.

The Court cannot, however, on this inquiry, lose sight of the situation in which the master and crew of the *Merced* stood in relation to her owner. He in no respect assented to this undertaking. It is not pretended that any discretionary power was given by him to use his vessel and cargo for purposes of this character. The master and crew took upon themselves to employ his property in an enterprise for their own profit. If successful, they expected to reap a rich reward; and, if otherwise, and their own vessel should be lost, they would run no other risk than that of their personal safety. They were in charge of property valued at about \$72,000, the whole of which was put in most imminent hazard by this act. The insurances upon the vessel, cargo and freight were all forfeited by the deviation made to rescue the wreck. Nor does the case stand relieved by the consideration that the libellants were impelled by the loftier motive of saving human life. It was, on their part, a mere enterprise for securing wrecked property, with a view to their own emolument. These remarks apply to the whole crew. The service was not enforced upon the seamen by the orders of their superior. The master had no authority, as they well knew, to exact it. He did not assume to do so. The crew were convened and fully consulted, and, after well considering the matter, gave their consent to the undertaking. With an earnest anxiety to encourage all efforts founded in humane motives, or tending to lessen the misfortunes of those whose property is abandoned at sea, Courts cannot overlook the

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paramount duty of a ship's company to avoid every act which may unnecessarily lead to an exposure, to injury and loss, of the vessel and cargo committed to their charge. The interests of commerce exact the strictest fidelity from mariners in the performance of the trusts reposed in them. Their whole skill must be devoted to the service, and they well know that they have no right to depart from this duty, except under the influence of a controlling necessity. Had the deviation in this instance been made with a view to save life, I should adopt the sentiment of an eminent judge, (*Bond v. The Cora*, 2 Wash. C. C. R. 80, 84,) and say, that I would not be the first to decide that such deviation should compromise any right of the owner or freighter. Yet, when no such motive incites to the act, and no justification for a deviation exists, I cannot think that the interests of commercial navigation would be subserved by placing in the way of sailors temptations to abandon their immediate duty, in pursuit of enterprises and adventures of salvage. If the Court should encourage seamen to put in imminent peril property worth \$72,000, with a view to rescue \$40,000 found derelict, it could not forbid their risking an Indiaman or a *Guarda Costa*, of ten times that value, for an object of still less importance. It is apprehended that the promulgation of such a doctrine would tend to unsettle the fidelity of seamen, and work measureless mischief to the security of navigation and trade. Whatever, then, the merits of the service may have been in relation to the owners of the *Waterloo*, the preceding observations indicate the opinion of the Court that the crew of the *Merced* stand in a much less meritorious light, upon their claims, in competition with those of the

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owner of that vessel. If their dereliction of duty detracts so greatly from the reward they might otherwise receive, the consideration ought to have a still more important influence in the case of the master. He not only encouraged and instigated the crew to a breach of duty, but, on his own part, more directly betrayed the confidence of his employer, and violated his obligation to his vessel. He put his vessel and her valuable cargo to an excessive and most improvident risk; and he must also have been conscious that this abandonment of the business in which he was employed, to engage in another so incompatible with the safe fulfilment of his instructions, might have prejudiced his owner to many times the amount of all which could be realized in salvage. It is well known to every intelligent ship-master, that his failure to execute the charge imposed upon him will usually affect his principal not only to the extent of the shipment, but that a series of mercantile arrangements is usually framed upon a voyage, which may be disconcerted, to the ruin of his owner. The master of the *Merced* had no right, in judging of the probable advantage his owner might derive from the salvage of the wreck, to estimate only the possibility of the entire loss of the brig and of her cargo in the adventure, but he should also have contemplated the consequences to his owner, if he failed to realize his funds in a European port, where they were destined, and would undoubtedly be anticipated. The bearing this might have upon his owner's credit and fortune, ought not to have been lost sight of by the master, who was relied upon to fulfil those expectations. If these considerations were too remote and contingent to be objects of attention at the time the master decided to undertake this

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rescue, he ought at least to have been certain, that if the enterprise should result unfortunately, and his own vessel be lost, his owner would be indemnified to that extent. Yet, disregarding this plain dictate of prudence, he embarked in a project which destroyed the protection of any insurance his owner might have had, and substituted nothing in its place beyond his own personal responsibility. This is not shown to have been of any value. Although this extraordinary disregard of obligations to their owner by the master and seamen might perhaps justify the Court in withholding all compensation from them personally, and transferring the whole salvage to the owner of the *Merced*, as his indemnity for the loss of the voyage, yet I am rather inclined to admit them to a moderate participation in the salvage, and shall therefore decree the payment of one-third part to them and two-thirds to the owner.¹

I shall not discriminate, in the distribution of the salvage among the ship's company, between the master and the common sailors. If the superior experience and seamanship of the master were most serviceable in securing the ultimate safety of both vessels, so the dereliction of duty on his part was more inexcusable than that of his associates. Without his approbation, they could not have abandoned the voyage in which they were engaged, to enter upon this undertaking, and

¹ In no previously reported case does more than one-half seem to have been allowed to the owner of the salvaging vessel. In *The Henry Eubank*, (1 Sumn. 400,) *The Harmony*, (1 Pet. Adm. Dec. 34 n,) *The Cora*, (2 Id. 361; S. C. 2 Wash. C. C. R. 80,) and *The Blaireau*, (2 Cranch, 240, 269,) one-third was given to the owner. In *The Cato*, (1 Pet. Adm. Dec. 48, 69,) *The Cumberland*, (cited in 1 Sumn. 421,) *The Waterloo*, (3 Dod. 433, 443,) and *The Columbia*, (3 Hagg. 428, 431,) one-half was given to the owner.

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there is no reason to suppose that, unless persuaded by him, they would have attempted or desired to do so. Besides, he chose, in order to secure his prize, to level himself to the situation of his crew. His witnesses testify, that he so weakened the force of the *Merced* as to be obliged himself to go aloft and to do the duty of a common sailor in all other respects, and he also imposed the like service upon the cook. The Court, therefore, deems it proper to mark this case, by allotting to the master only the compensation of a common seaman, and to the sailors such reward as will barely show that the Court does not disregard the bravery and perseverance with which they devoted themselves to the preservation of both vessels after they had embarked in the enterprise. Had these high qualities been displayed in a case free from the improprieties that accompanied this undertaking, the Court would have felt great satisfaction in bestowing upon them the most liberal reward. If the master had been the owner of the *Merced*, or if she had been of very trifling value compared with the wreck, the Court would have experienced the sincerest gratification in compensating him and his crew according to their respective merits in planning and prosecuting the salvage service.

The reasons which have led the Court to the conclusion now adopted are already sufficiently detailed. It only remains to add, that there appears, from the proofs, to be no occasion for making a distinction in the apportionment of the salvage amongst the seamen. Each was required to do all that his strength would admit, on board of both vessels. I shall accordingly decree that the one-third part of the salvage be divided among the ship's company, (including the pas-

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senger who performed the duty of a sailor with the others,) share and share alike. Out of the residue of the proceeds in Court, after deducting salvage, the clerk will pay the taxed costs of the libellants in their suit, and also in their answers and claims to the actions on the part of the United States, and the taxed costs and disbursements of the marshal, and the taxed costs of the clerk. The British consul having properly interfered to protect the interests of British subjects who might be interested, his taxed costs are also to be satisfied; and, it being made to appear to the Court, that those interested in the *Waterloo* and her cargo have since sanctioned the steps taken by the Messrs. Barclays in behalf of the British underwriters, the clerk will further pay the taxed costs of those parties. The residue of the fund will remain in Court, to abide its further order, on the application of those who may be entitled to it.

Decree accordingly.

THE FAIRPLAY.

Where a seaman agrees to serve for one-half of the earnings and profits of the vessel, he cannot maintain an action *in rem* to recover such share, unless an account has been stated, or the claim has been otherwise reduced to a certainty.

An action *in rem* cannot be brought to compel an accounting between parties. Whether an action *in personam* in Admiralty will lie for that object, *quære*.

February, 1880.

THIS was a libel *in rem* for seamen's wages, as upon an ordinary hiring. The vessel was chartered from the owner, for a trading voyage between Halifax and New-

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York, by the claimant, who was her master. The owner was to receive one-half of her earnings. The libellant served as second in command for a period of five months, on an agreement with the claimant to divide with him equally the earnings and profits of the vessel whilst she was navigated under the charter party. The libel alleged that \$305 81 were due to the libellant as his share. The answer denied this, and averred that the libellant was himself indebted upon the adventure in the sum of \$139 60. It did not appear that any account had ever been stated or made up between the parties, of the earnings and expenses of the vessel.

George Sullivan, for the libellant.

Daniel B. Tallmadge, for the claimant.

BETTS, J.—There is no proof before the Court that any profits have been made in the adventure. This the Court cannot presume from the fact that freight was earned, as, in the point of view most favorable to the libellant, he could have no claim upon the freight until the charges and expenses of the voyage had been ascertained and satisfied. But the true character of the arrangement, as it appears by the pleadings, was one of mutual hazard and risk between the libellant and the claimant, and it is not in the power of the former to change it at his option, to a hiring on wages certain.

The contract was, in its nature, indubitably maritime. A seaman may hire for a share of the earnings of a voyage, in lieu of a stipulated sum, and his interest and compensation under such a contract will be wages, and be recoverable in that name. (*Abbott on Shipp. ed.* 1829, 432; *The Frederick*, 5 Rob. 8.) It is, however,

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the adjusted balance to which his interest attaches, and he has no property or right in anything beyond that. (*Abbott on Shipp.* 432 n.) The equitable claim of a seaman to earnings in an adventure, which are not liquidated, cannot assume the privilege of wages, so as to attach as a lien to the vessel, subjecting it to arrest and detention to abide the winding up of such transactions. This doctrine is maintained in the case of *The Sydney Cove*, (2 *Dod.* 11.) When the voyage is terminated, and the profits, if any, have been ascertained on an adjustment of the accounts, the proportion of those profits which belongs to the seaman is wages, and may be sued for and recovered as such in Admiralty or at law. (*Wilkinson v. Frasier*, 4 *Esp.* 182; 1 *Chitty's Com. Law*, 359.) A proceeding *in rem* is not a method allowed to be taken to compel an accounting. A vessel cannot be seized and detained to ascertain, on the settlement of accounts, whether the seaman has a claim against her. There must be positive evidence that wages are due, to justify that process. The 2d section of the act of Congress of June 19th, 1813, (3 *U. S. Stat. at Large*, 2,) which gives a remedy *in rem* to fishermen for their shares of a fishing voyage, plainly imports that Courts of Admiralty are incompetent to afford that kind of relief without the authority of a positive statute.

Whether an Admiralty Court can entertain an action of account, on a libel *in personam*, is exceedingly doubtful, but that point is not raised for decision in the present case.

The libellant having failed to make out a claim which is a lien on this vessel, his libel must be dismissed, with costs.¹

¹ On appeal to the Circuit Court, this decision was affirmed by Thompson, J.

THE CADMUS.

The 5th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 133,) designates the only case in which a forfeiture of his wages by a seaman is peremptory, and is the only decree which the Court can render.

What is a sufficient entry in the log-book to prove the desertion which works such forfeiture.

Where the only defence set up to a libel for wages is the desertion of the libellant, the Court will not award a sum less than that due, because of misconduct not amounting to desertion.

Where the defence is to the entirety of wages, because of criminal misconduct by the seaman, no ground is thereby afforded for claiming a diminution of wages, or an equitable set-off.

Where a seaman ships for a certain time, a discharge by the master, actual or constructive, entitles the seaman to sue for wages at once, though the stipulated time of service has not expired.

March, 1830.

THIS was a libel *in rem* for wages. The shipping articles were, "from the port of Boston to a port or ports in the West Indies, and back to a port or ports in the United States, for and during the term of six months from September 25th, 1829." The vessel arrived at New-York on the 25th of December, 1829. The main defences set up on the hearing were, that the action was prematurely brought, the six months stipulated by the articles not having expired; and that the libellants were absent from the vessel, without leave, for more than 48 hours after her arrival at New-York, and had forfeited all wages by such desertion, under the provisions of the 5th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 133,) which provides, that if any seaman who shall have subscribed the articles, shall absent himself from on board the ship without leave of the master or officer commanding on

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board, and the mate or other officer having charge of the log-book shall make an entry therein of his name on the day on which he shall so absent himself, if he returns within forty-eight hours he shall forfeit three days' pay for every day's absence, to be deducted out of his wages; if he is absent more than forty-eight hours at one time, he shall forfeit all the wages due him, and all his goods and chattels on board of the ship, or in any store where they may have been lodged at the time of the desertion, to the use of the owners of the ship, and shall, moreover, pay all damages.

The following entries in the log-book were relied on to sustain the defence :

" Friday, Dec. 25.—Gave the crew liberty to go ashore, with strict orders that they must be on board early in the morning, to attend to their duty.

Saturday, Dec. 26.—Employed in getting everything in readiness for discharging cargo. John Smith and Charles Matthews have been absent from the vessel during the day, without permission; employed two men to work in their place two hours and a quarter each.

Sunday, Dec. 27.—John Smith and Charles Matthews made their appearance this morning, and said they would not do any more work on board the vessel unless the law obliged them to.

Monday, Dec. 28.—John Smith, Charles Matthews and Abraham Estrom were down this morning, and were asked if they would go to their duty; they said no! which I call a plump refusal. Three laborers employed for the day.

Thursday, Dec. 31.—Employed lumpers to discharge the cargo. Seen nothing of the three men that left during the day; names mentioned before.

1830. Friday, January 1.—Stevedores at work discharging cargo, John Smith, Charles Matthews and Abraham Estrom still absent from the vessel, and have not shown themselves (alongside) these two days past. Gave John Harrison and David Harrington permission to go ashore, to be on board early in the night.

Saturday, January 2.—John Harrison came on board this evening, having been absent during the day, and said "it was his intention to leave the vessel, that he had found a new ship," and went ashore again.

Sunday, January 3.—Charles Matthews, John Smith, Abraham Estrom and John Harrison still ashore.

Monday, January 4.—Employed a carpenter from shore to finish a job of work which John Harrison, the carpenter, had left unfinished; the four men mentioned before are still absent.

Wednesday, January 6.—John Harrison came on board and picked up some carpenter's tools which had been in use, and went away with them, against my orders.

Thursday, January 7.—Charles Matthews, John Smith, Abraham Estrom and John Harrison are still absent from the vessel without permission."

On the 6th of January the libellants were discharged by the master, and on the 9th this action was instituted pursuant to the statute, by summons, &c.

Edwin Burr, for the libellants.

Robert Sedgwick, for the claimants.

BERRS, J.—The whole amount of wages earned not having been paid, the defence to the action is put upon

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two grounds: (1.) An absolute forfeiture of the wages; and (2.) That no right of action existed at the time the suit was commenced.

Admitting that the penalty of the act may be applied to a case of absence without leave in the port of destination and after the vessel has been moored, (which point is not now considered,) it seems to me that the specific proof required by the act to entitle the claimants to a forfeiture of wages is not supplied. The act provides, that if any seaman who has signed articles shall absent himself, without leave, and a proper entry shall be made thereof in the log-book, on the same day, &c., and the absence continues more than forty-eight hours at one time, he shall forfeit his wages, &c. It seems to me, that the act designates the only case in which a forfeiture of wages, *eo nomine*, must be inflicted by the Court, and thus far qualifies the punishments awarded under the law maritime for various acts of mal-conduct on the part of sailors, that of desertion included.

Judge Story, in his note to *Abbott on Shipping*, (ed. 1829, p. 468,) sums up the effect of the decisions upon this provision of the statute. To lay a foundation for the forfeiture of wages, under the statute, the entry must strictly conform to the terms of the act. The absence must be stated to have been without leave, and to have continued more than forty-eight hours, and the entry must be made in the log-book on the day the mariner absents himself. No other proof will supply either of these omissions. The defence on this point accordingly rests on the question, whether, in fact, the libellants were *logged*, as it is termed, on the same day they left the ship, and charged with absenting themselves without leave; and whether such entry was

made forty-eight hours previous to their being dismissed by the master.

Those of the libellants who are charged with having deserted the vessel, and thus forfeited their wages, are Charles Matthews, Abraham Estrom and John Harrison. I think the evidence produced does not make out the fact of desertion, according to the requirement of the statute. The only explicit entry affecting the libellants, is that of December 26th in relation to Charles Matthews, and that of January 7th in relation to the three above named. The first entry may have been sufficient in form, but the succeeding entries show that Matthews did not continue absent forty-eight hours, and no more could be effected by this entry, if good proof, than a deduction of wages for the time of his absence. The last entry is deficient in one important requisite, as it does not purport to have been made on the same day the seamen absented themselves. It rehearses the fact that they were absent without permission, but would seem to have reference, as to two of them, to the entry of the 31st of December, to denote the time and manner of such absence. That entry is, that nothing had been seen of the three men who left during the day. The reference to the previous mention of their names may be sufficient to indicate, with all necessary certainty, Matthews and Estrom as those intended. The reading of the two entries then would be, that Charles Matthews and Abraham Estrom left the vessel during the 31st of December, and were still absent, without permission, on the 7th of January. This is not that positive and distinct assertion, by an entry made at the time of absence, which is demanded by the act and recognised by the decisions as requisite to fix a forfeiture of wages

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on the seaman, even if the terms "*without permission*" may avail the claimants the same as the statutory phrase "*without leave*." The entry was not made on the day the act was done, and does not assert that the libellants absented themselves without leave, but equally admits the construction that it was the continuation of the absence, and not its inception, that was without permission.

The entry of the 6th of January, in respect to Harrison, is equivocal and insufficient in two respects: first, it is uncertain whether his simply going away, or his going away with the carpenter's tools, was against the orders of the mate; and, secondly, the log-book does not aver that he was absent without leave, but only without leave of the mate, even if the entry of his going against orders is to be taken as asserting that he went without leave. The proofs in such a case should show that the authority over the vessel and the men was, at the time, with the mate; otherwise, a special entry in this form would leave room for an implication that the sailor had leave of absence from some other officer. But, without pressing this criticism upon the terms of the entry, the entry is not in substance of a character to produce a forfeiture of wages. It does not purport to charge the man with absenting himself from the ship without leave, but with disobedience of the orders of the mate in going ashore. The mate may have forbidden his going, though he had previous leave from competent authority. The entry of the 7th of January, for the reasons before given, is not sufficient to subject Harrison to a forfeiture of wages.

The mate testifies, that on Wednesday, the 6th of January, at furthest, (and he is not certain but it might

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have been on Tuesday, the 5th,) the other two libellants offered to unload the cargo, but the master refused to receive them, or to have anything further to do with them. This act of the master, therefore, destroys, as to them, all the efficacy of the entries in the log subsequent to that day.

There is not, then, as against either of the libellants, proof that they were absent from the vessel without leave for forty-eight hours after being logged, even if the entry had been made in the manner required by law, and a forfeiture of wages cannot be enforced against them. As the claimants insist upon the enforcement of the inflexible punishment of a forfeiture of wages for the offence charged upon the crew, it is no more than meet that, in obtaining such penalty, they should, on their part, be held to conform their proof to the strictest letter of the law.

It is unnecessary to consider how far the conduct of the libellants might subject them to punishment, by diminution of wages, for an infraction of the law maritime, because no equitable indemnity is sought by the owners for that cause. The whole defence is, that the libellants were guilty of the desertion which carried with it the penalty inflicted by the statute. It is not claimed in the answer that the libellants have, by disobedience of orders, unwarrantable absence from the ship, or neglect of duty, rendered themselves liable to make good the damages sustained by the claimants, or exposed themselves to such punishment as the Court may, in its discretion, under the rules of the maritime law, in respect to acts of malfeasance or nonfeasance on the part of sailors, see fit to impose—such as an adequate mulct or abstraction of wages, because of a breach

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of contract or an omission to perform the duties enjoined by law. On the contrary, an absolute forfeiture is insisted on, upon the ground that the statutory offence has been committed and that the statutory punishment must follow. I shall accordingly hold, upon this branch of the defence, that the necessary proof, as required by the statute, has not been produced on the part of the claimants, to subject the libellants to a forfeiture of wages.

I am the more ready to exact a strict compliance, on the part of the master, with the rule prescribing the manner in which the entry of absence shall be made in order to be evidence of desertion, because it most manifestly appears that the seamen were on inquiry as to their rights, and had not wilfully abandoned the vessel with the design of desertion. They did not intend to leave her, unless they were legally acquitted of their agreement. If this will not entirely exonerate them under the maritime law, it may at least be rightfully regarded, in a Court of Admiralty, as mitigating the offence, and taking from it the character of wilful desertion. (*Abbott on Shipping*, ed. 1829, 464 n.) They presented themselves every day on board, and evinced no intention to commit a wilful violation of their contract or duties. The officers also seem to have impliedly acquiesced in the propriety of the seamen's proceedings, inasmuch as no steps were taken to enforce their obedience to the service asked of them.

The other branch of the defence is, that no right of action existed at the time this suit was instituted. The period of service contracted for by the articles had not expired by lapse of time. The libellants contend, that the true meaning of the articles is, that the contract

continued until the arrival of the vessel at her port of delivery in the United States; that she might make one or more ports before reaching that of her final delivery; but that the whole run must be accomplished within the period of six months. The claimants contend, that the term of service was to last for six months, and did not expire when the vessel reached the United States, or, if it did, that the libellants were bound to discharge the cargo, and could not prosecute for their wages until the expiration of ten days after the safe mooring and unloading of the vessel. The libellants also show a deviation from the voyage mentioned in the articles, to Maracaibo, on the Main, and claim that this absolved them from their agreement, and gave them a right to their discharge and pay on the entrance of the vessel into this port.

The view I take of the evidence will render it unnecessary to discuss the meaning of the agreement in the articles, or to consider what effect a deviation like the one here set up might have upon the mariner's contract. Because, as it seems to me, the libellants show that they were discharged from the vessel after her arrival in this port. After such discharge, a mariner's connection with his vessel and his obligation under his contract are terminated, and he may at once recover wages then due. The libellants swear, that as soon as the vessel was made fast, the mate gave them leave to go ashore, making at the same time declarations which might well be taken as a discharge, if the proof of them were clear. This, however, is denied by the mate, and higher credit is to be given to his testimony, in this case, as to his own declarations. Still, the conduct of the master for several succeeding days, in not requiring the men to go

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to their duty, though they were in the habit of coming on board the vessel every day, might import that he understood they were discharged and meant they should so understand it. There is room for doubt, however, whether the discharge was absolute, and one of which the libellants can avail themselves, previous to the 6th of January, when the captain sent them off, telling them he should have nothing more to do with them. This was but three days before the suit was commenced, and had the point of discharge been made a subject of controversy at the hearing, I should have felt disposed to direct further proofs to be taken upon it. This point may have been fully litigated on showing cause before the magistrate, before issuing process against the vessel, and his decision may have been satisfactory to the parties, especially as it appears by the proofs that the cargo was discharged on the 2d of January, and that on the 12th, when the mate was examined, the brig was about to proceed to Boston. Although this point is open upon the pleadings, and the claimants are authorized to raise the objection and demand the judgment of the Court upon it, yet the Court may be satisfied with less evidence than if it had been the leading point in contestation before the magistrate on the summons, or on the hearing here.

When the contract is terminated, the right to wages becomes perfect in the seamen. The contract need not end by the fulfilment of its terms. A discharge of the seamen by the master, or a constructive discharge by breaking up the voyage, will entitle them to demand payment of their wages. (*Abbott on Shipping*, ed. 1829, 442 n.) The proofs satisfy me that the men were allowed to leave the service by the master, and, there-

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fore, the defence that the right of action had not accrued when the suit was brought, cannot be maintained.

Accordingly, I decree for wages and costs, with the usual reference to the clerk to ascertain the amount due, and report thereon to the Court.

Decree accordingly.¹

THE BALTIC.

The regular method of proceeding against a surety in a stipulation for costs in a suit in Admiralty, is by petition, after notice to the surety.

In such a case, the decree may be final and peremptory.

Upon a proceeding by motion, after a personal demand of the costs from the surety, a conditional decree only will be awarded.

August, 1830.

THIS was a motion for a decree of condemnation against the surety in a stipulation in behalf of the libellant, in a suit in Admiralty *in rem*, to pay costs, &c. Notice of the decree dismissing the libel with costs, and of the return of the execution against the principal unsatisfied, was served on the surety, together with a taxed bill of the costs, and payment of the costs was regularly demanded.

BETTS, J.—The jurisdiction of the Court over the parties and the subject matter, in bail stipulations, is

¹This decree was reversed on appeal by the Circuit Court, in December, 1830, on two grounds, as it is understood: 1st. That the contract did not terminate with the arrival and discharge of the vessel at her last port of destination, but was for six months certain; 2d. That the statutory penalty of forfeiture applied to an unlawful absence of a seaman from his vessel for forty-eight hours, if proved according to the general rules of evidence.

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fully established, and is exercised by awarding judgment and execution in a summary manner. (*The Alligator*, 1 *Gall.* 145, 149.) This power is necessarily incident to the Court, in consequence of its jurisdiction over the principal cause.

It would be the more convenient and fit mode of practice, to pursue, in these cases, the course of the Court in summary proceedings. The application to the Court should be upon petition, a copy of which ought to be served on the party to be affected, and then the decree of the Court might be peremptory. The present procedure, by motion, after a personal demand of costs from the surety, is sufficient to give the Court cognizance of the matter, but, instead of a final, only a conditional decree will be awarded in this state of the case. The surety should have been directly apprized of the proceeding, and have had the opportunity to acquit himself of the obligation without incurring further costs or subjecting himself to be attached for contempt of Court.

A decree must be entered, that the surety pay the taxed costs in the principal cause within ten days after notice of this order, or that an execution issue against him for that amount and also for the costs of these proceedings.

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THE MARTHA.

The Act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 181,) makes desertion, carrying with it a forfeiture of wages, a statutory offence, and defines the evidence by which it is to be established.

There can be no desertion after the voyage is ended.

The voyage is ended when the vessel is safely moored at her last port of discharge.

Fifteen days will be taken to be a reasonable time for a vessel to unload in ordinary cases, and where, for wages due on the delivery of the cargo, a vessel was arrested on the fourteenth day after she was moored in her port of discharge, the suit was dismissed as prematurely brought.

There is no distinction between what is necessary to constitute the delivery of a cargo where it is owned by a freighter, and where both ship and cargo belong to the same person.

The mere offer of a master to pay a seaman's wages is not necessarily an admission that the wages are due and payable.

A libel brought before the right of action is perfected, must be dismissed, if duly excepted to on that ground, though such right becomes perfected during the progress of the suit.

The case of *Thompson v. The Ship Philadelphia*, (1 *Pet. Adm. Dec.* 210,) examined.

Courts of Admiralty will dispose of the question of costs according to the general equities of the case.

Where a dilatory plea was joined with a defence upon the merits, and the libel was dismissed upon the former, though it would have been sustained upon the latter, it was dismissed without costs.

The Court will not allow its recollections or impressions of verbal consents and understandings between counsel, not entered in its minutes, to interfere with or control the rights of parties.

A Court of Admiralty will not, except with the free consent of all the parties to be affected, grant a rehearing, or modify its definitive decree, after the term in which the decree is rendered. If the Court has the power to do so,

such a practice has not been adopted.

A decree made on a rehearing without such consent, modifying a final decree made at a previous term, was held to be a nullity.

Remble, that a consent to a rehearing by the parties to a suit, will not affect the rights of a surety in a stipulation for costs, who has been discharged by a previous final decree.

September, 1830.

THE libellant shipped as seaman on board the ship Martha, at New Orleans, for a voyage to Laguyra,

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thence to one or more ports in Europe, and back to a port of discharge in the United States. One of the printed stipulations in the articles signed by him was as follows: "And it is further agreed that no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at her last above-mentioned port of discharge, and her cargo delivered." The vessel arrived at New-York on the 21st of February, and was moored on the 22d. On that day the libellant left the ship without permission, and did not return to his duty, and on the same day his absence was entered by the mate in the log. The cargo was not entirely discharged until the 12th of March. On the 5th of March the libel in this action was filed *in rem* for the recovery of wages, and on the 8th the monition was issued and the vessel was arrested. The defence was, that the wages were forfeited by the desertion of the seaman, or, if not forfeited, that the right of action for them had not accrued at the time the suit was instituted.

Erastus C. Benedict, for the libellant.

John Anthon, for the claimant.

BETTS, J.—The payment of wages to the libellant is resisted, upon the ground that he deserted the vessel, and thereby forfeited his wages; and this conduct on his part is said to have worked a forfeiture, both under the penalties of the law maritime and under the provisions of the act of Congress of July 20th, 1790. (1 *U. S. Stat. at Large*, 131.)

I have several times ruled that the desertion of sea-

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men from the merchant's service, so as necessarily to work a forfeiture of wages, has now become a statutory offence, and must be established in the mode designated by the act of Congress. The inquiry, therefore, will not be, whether the particular act of malfeasance charged upon the libellant constituted an offence under the maritime law, which carries with it, as its appropriate punishment, a deprivation or abstraction of wages, but whether it comes within the provision of the statute, so that the judgment of forfeiture is the only one the Court can pronounce.

It is a well-understood rule in the construction of statutory law, that when new conditions or requirements are imposed in respect to existing offences, so that those acts constitute the offence which would not have constituted it before, the statute necessarily becomes the exclusive rule, and abrogates or supplants the preceding one. The thing prohibited is no longer an offence, except as it is brought within the terms of the act. (*Castle's Case*, *Cro. Jac.* 644; *Regina v. Wigg*, 2 *Salk.* 460; *Rex v. Robinson*, 2 *Burr.* 799.) If this be so with regard to offences at common law, where the familiarity and notoriety of the common law rule would more safely admit statutory regulations to be considered as subsidiary, it should apply with inflexible strictness to maritime cases, where the customary law is to be sought for in obscure and remote usages, practised not by our own people, but by foreigners, and in periods of comparative ignorance and barbarism.

When Congress assumed to legislate in respect to the offence of desertion by mariners, and its consequences to them, it can hardly be supposed that they designed merely to introduce another particular within

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the limits and penalties of that offence. What the exigencies of the case demanded of the Legislature was a clear and precise designation of the duties and responsibilities of seamen in the merchant's service, and especially those most prominent ones, their obligation to the vessel, and their liability to the loss of wages for the breach of it. The uncertainty of the maritime law, as to what constituted a desertion, was alike vexatious and injurious to owners and seamen. Was a mere leaving of the ship without permission a desertion? or, if not, how was the *animus revertendi* to be ascertained? What was the rule which would protect the seamen from the resentment of an exacting master, and the ship from a heedless or wrongful abandonment by the crew? The question was never settled merely by lapse of time, and accordingly controversies were incessant whether the master might regard the shortest unjustifiable absence as a desertion, or the men purge the longest by a lagging and reluctant return. The statute meets this difficulty. It looks to the fact of absence without leave, and marks that as the characteristic of desertion. With whatever purpose of mind to return the seaman may have withdrawn himself, still his going from the ship without leave supersedes all inquiry into the *quo animo*. The law, however, makes the reasonable allowance of forty-eight hours within which the sailor may come back, and be only subject to the loss of three days' wages for his misfeasance. And, furthermore, most effectually to guard the seaman from the resentment of the master, excited by any subsequent occurrences, it takes from the latter the power to revive such act of misconduct, or to change that into a desertion which was not so regarded at the time, by requir-

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ing that the absence shall be entered on the log-book on the day it occurs, and that the entry shall state the absence to be without leave. This was a most provident regulation. One-half of the attempts of masters to bar seamen of the recovery of their wages, which have passed under the observation of this Court, are founded not directly upon the act of misconduct alleged, but are excited by some after occurrence, as a prosecution for wages or for assault and battery, or by some irritation of personal feelings on the part of the master or his officers, under the influence of which the master seeks to give to all preceding misconduct of his men the most odious colorings, and to demand a forfeiture of wages for alleged desertions not denounced as such at the time they occurred.

The Courts, therefore, for the protection of seamen, exact from the master the most rigid compliance with the requisitions of the act in this behalf. (*Malone v. The Mary*, 1 Pet. Adm. Dec. 139; *The Phoenix*, Id. 201; *Herron v. The Peggy*, Bee's R. 57; *The Phoebe v. Dignum*, 1 Wash. C. C. R. 48.) In my opinion, the statute has specified and defined the desertion by seamen which necessarily incurs a forfeiture of wages, and no desertion having that effect can be established against seamen, except conformably to the statutory directions. In this country, the point is governed by positive law, and all codes or usages of other nations, which are conflicting or inconsistent with the statute, are to be disregarded. The provisions of the statute are broad enough to meet every case, and I cannot suppose that Congress meant to legislate respecting heedless and frequently inadvertent absences, and to convert these into desertions, and, at the same time, leave the

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greater offence of a wilful abandonment of the ship, to the uncertain rules and dogmas of the maritime law as previously administered, that is, to be punished by a simple mulct or abstraction of wages, at the discretion of the Court.

The inquiry, therefore, is, whether the act now in proof is such a desertion, and whether it is established by such proof as the statute directs. It must be borne in mind, that it was after the full arrival of the vessel at her port of discharge in the United States that the seaman left her. She reached this as her last port of discharge, from a circuitous voyage, on the 21st of February, and was safely moored on the day following. This, in nautical acceptance, was ending the voyage. The *voyage* denotes the transit to be performed by the seaman, and it is in this sense that the term is used in the law maritime. (*Emerigon, Cont. de la Grosse, ch. 8, § 1; Frontine v. Frost, 3 Bos. & Pul. 302; The Baltic Merchant, 1 Edw. 86.*) The seaman is usually bound by his articles to continue with the vessel and unlade her, and perhaps his obligation to perform that service might, under the maritime law, be regarded as incident to his hiring. (*The Baltic Merchant, 1 Edw. 91.*) Yet, in so doing, he is considered as fulfilling a specific engagement of service, direct or implied, and not as continuing the voyage. The vessel being securely moored at her port of destination, the duties of mariners, as such, are fulfilled, and any further acts of theirs become those of stevedores or laborers, and the seamen are bound to perform them only by force of special stipulations in the shipping articles. (*Cons. del Mare, ch. 74, No. 144.*) A neglect or omission of this duty may be appropriately punished by deductions from

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former earnings; (*The Baltic Merchant*, 1 *Edw.* 92;) and the earnings payable for the performance of one duty, may well be made chargeable for neglect to perform the other, because the agreement, though consisting of two parts, is entire in its object and effects. The act of Congress is in harmony with this distinction between the termination of the voyage and the unlivery of the cargo, though it requires the two things to concur to entitle the seamen to sue for their wages. (*Act of July 20th*, 1790, § 6, 1 *U. S. Stat. at Large*, 133.)

In my judgment, the offence of desertion under the statute, which carries with it the absolute forfeiture of wages, can only be committed during the continuance of the voyage, and must accordingly take place anterior to the safe mooring of the vessel at her last port of delivery. As, then, in the present case, the seamen left the vessel after her voyage ended, their departure did not constitute the desertion contemplated by the act, which must be punished by forfeiture of wages, clothing, &c. I do not, therefore, consider it necessary to pass upon the sufficiency of the entry in the log in this instance, because, if sufficient, it has relation to a period of time after the voyage was ended in nautical acceptance, and when the offence could not be committed. This decision will not, however, exonerate seamen from proper responsibility for such offences. The articles themselves make adequate provision for such a case, and the principles of maritime law, which are not superseded by positive legislation, provide sufficient punishment for malfeasances of this character. It is competent for the Court, in either aspect of the case, to decree, by way of abstraction of wages, a suitable compensation to the owner for the unfaithfulness

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or misconduct of the seamen; and I am persuaded it will in practice be found as efficacious, in holding seamen to fidelity in their engagements, to lessen the amount they receive at the end of the voyage, as to strip them and their families of all pay for services during the entire voyage, together with their savings laid up in clothing.

A further objection taken to the suit by the claimant, is, that the right of action had not accrued when the suit was instituted. By a stipulation in the articles, the wages were not to be paid until the cargo was delivered. The delivery was not completed until several days after the action was commenced. But there need not in every case be an actual unloading of the cargo, to constitute the delivery contemplated by the agreement. If the consignee should refuse to accept the cargo, or unreasonably delay its discharge, the seaman cannot by such acts lose his rights, and would be considered as having complied with his stipulation by delaying his suit a reasonable time. What is a reasonable time for the unlivery of cargo, is not made certain by any fixed rule of law. By the 52d article of the Laws of Wisbuy, from eight to fifteen days are allowed, according to the circumstances of the voyage. By the 21st article of the Laws of Oleron, the same period is allowed for a vessel to discharge. (*1 Pet. Adm. Dec. App.*) The laws of the United States require every vessel under three hundred and fifty tons burden, to be discharged of her cargo within fifteen working days after her report in her port of discharge, and every vessel over three hundred and fifty tons, within twenty working days, and the vessel is to be reported within twenty-four hours after her arrival. (*Act of*

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March 2d, 1799, §§ 30, 56, 1 *U. S. Stat. at Large*, 649, 669; *Act of March 3d*, 1821, 3 *U. S. Stat. at Large*, 640.) Following the spirit of these statutes, the District Court in Pennsylvania often allowed fifteen days, and sometimes more, to unlade the cargo, before the seaman's right to claim wages was perfected. (*Edwards v. The Susan*, 1 *Pet. Adm. Dec.* 165; *Thompson v. The Philadelphia*, 1 *Id.* 210; *Hastings v. The Happy Return*, 1 *Id.* 253.) The voyage ends for the seaman when the vessel is moored. She is then, in judgment of law, in a condition to unlade at once. In our chief ports, it would rarely happen that twenty working days would be expended in unlading the largest ship. The statute has allowed time amply sufficient to cover any delay in obtaining permits from the custom-house, or in placing the vessel in a position to begin her actual discharge after her report is made, or in providing for other contingencies which may occasion loss of time. In Massachusetts, the rule seems to be general to allow the statutory period for discharging the vessel, without regard to the special circumstances of the case. (*Abbott on Shipp.* 456, *note.*) There is convenience in this analogy, but I do not think a too implicit obedience should be paid to it, and I am disposed to follow the rule in the Pennsylvania district, allowing special circumstances to abridge or prolong the time of unlading, but adopting fifteen days as a fair average period. In this case, even if the action be considered as having been commenced by the issue of the monition, but fourteen days had elapsed, and two of those were Sundays.

No special circumstances are in evidence, calling for an abridgment of the ordinary time. On the contrary,

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a proper degree of despatch is proved, and, considering the state of the weather, the vessel was unladen in a reasonable time. Since, then, sufficient time for the unloading of the cargo had not elapsed when the suit was instituted, and since, also, it was commenced before the time fixed by statute for the unlivery of the cargo had expired, it must be held to have been prematurely brought.

This objection of the claimant being well taken, and no motion to amend or rectify the proceedings having been made or granted, I cannot, in the present shape of the pleadings, enter into an adjustment of the amount of wages due the libellant, or fix what compensation, if any, he ought to make the owners for withdrawing his services from the vessel. The action in this form must be considered as dismissed or suspended. But the main defence, which rested on the charge of desertion, having been gone into by the claimant, and decided in favor of the libellant, and the libel being stayed upon a point of form, in respect to other particulars, and not on the merits litigated between the parties, I shall give the libellant leave to file a new libel, or supplementary allegations to the one before the Court, and to offer further proofs in the cause to show that he had a full right of action when his suit was commenced; and the final decree in the cause upon the merits, and the disposition of costs, will be deferred until the reformed pleadings and new proofs come in. The practice authorized by this decision is intended to be carried at present no further than the necessity of the particular case; that is to say, the claimant having given the Court cognizance of the cause by intervening and contesting the question of forfeiture, and that juris-

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diction still continuing after the libellant's right to sue for wages has matured, the latter will be permitted now to frame his libel so as to meet the objection that the recovery of wages cannot be had in the present form of the pleadings.

The libellant, under the above permission, filed several additional articles, alleging,

1. That the claimant of the ship was sole owner of her cargo, and that, as matter of law, the arrival of the vessel was a delivery of her cargo, within the meaning of the contract;

2. That the cargo might, with ordinary diligence, have been unladen, and the vessel discharged, within ten days from her arrival;

3. That no provision was made on board the vessel, or elsewhere, by the master or owner, for the support of the libellant until his wages were payable;

4. That previous to the commencement of any proceedings for the recovery of wages, the master called on the libellant's proctors, and told them that the libellant's wages were ready for him.

The libellant proved the facts set up in the first and fourth allegations, but failed to prove those set up in the second and third.

Edwin Burr and *Erastus C. Benedict*, for the libellant.

Gerardus Clark, for the claimant.

BERRA, J.—It is contended that the terms of the shipping agreement were fulfilled, as the cargo was in fact delivered before the suit was brought. It is sup-

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posed there is a distinction in respect to the delivery of a cargo where it is shipped by a freighter, and where both ship and cargo are owned by the same person. It is not denied, that in the former case there must be an actual unloading to constitute a delivery; while it is argued, that in the latter, when the ship returns to the port of the owner, the cargo comes into his possession in such manner as to amount to a delivery of it from the ship. I cannot perceive any legal ground for the distinction. The contract of the seaman has no regard to the legal delivery of the cargo, which constitutes a change of property in it. It is as much the property of the consignee, and delivered in point of law, when it is shipped at the port of departure, as when it is unladen at the port of discharge. (*Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 Bos. and Pul. 582.) To construe this clause of the shipping contract to mean a delivery in law, would be to hold that it was satisfied the moment the cargo was laden on board. The delivery referred to in the contract denotes the unloading of the vessel, frequently called, in the maritime law, the unlivery of the cargo. The other provisions of the contract import this. The mariner is not to leave the vessel until she be *discharged of her lading*, nor to receive his wages until her arrival at the last port of discharge, and *the cargo delivered*. The delivery of the cargo is made a distinct thing from the arrival of the vessel, and that delivery is the discharging her of her lading. The shipping articles are intended to correspond in substance with the provisions of the statute in this respect, and the Court will always endeavor, in interpreting the articles, to enforce that conformity. By the 6th section of the statute, (*Act of July 20th*,

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1790, 1 *U. S. Stat. at Large*, 133,) the seaman becomes entitled to his wages "as soon as the voyage is ended and the cargo or ballast be fully discharged at the last port of delivery." It is no less important to the ship-owner, when he is his own freighter, to have an opportunity to ascertain the condition of the cargo, and detect embezzlements, and charge them, if discovered, upon the crew, than when he is merely a carrier for others. It would also be usually not less desirable for him to have reasonable time to raise funds to meet the charges of the ship, when the cargo is his own, than when those funds are to be collected from freighters. In both points of view, it would be in consonance with the character of the service of seamen, that their wages should not be payable until the actual delivery of the cargo, or until a reasonable time for that purpose had elapsed, and a stipulation on their part to that effect would be appropriate to their character and obligatory upon them.

It is further contended, on behalf of the libellant, that the offer of the master to pay the wages is evidence that he recognised and admitted the libellant's discharge, and that he was entitled to demand them. But the mere offer of the master to pay the wages, in the way in which it was made in this instance, cannot properly be understood as an admission of any legal liability on his part. It was stated on the argument, (and the fact would be implied under the proof,) that the libellant's proctors had made application to the master, and demanded payment of these wages. He knew that a litigation must ensue, unless the claim was satisfied, and his declaration, under these circumstances, that if the libellant would call at a designated place,

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his wages were ready for him, ought not to be construed into an admission that wages were due at all, much less that they were due and payable because the libellant had fulfilled his engagement and was discharged from the ship. There was a dispute, and a heated one, respecting the libellant's claim to wages. Under these circumstances, it would be a most strained and harsh interpretation of the language of the master, to consider it as having admitted the absolute right of the libellant. Admitting the declaration of the master to have been an offer to pay, it was a qualified, or conditional one; and I do not think it imported any thing more than that the master would rather pay the sum demanded, at a place convenient to him, than litigate the question with the sailor. Such concessions and admissions are never received as waiving any legal defence of the party. The Courts encourage attempts at compromise and settlement, and will not permit any act done or language used on such occasions to work a prejudice to the party making the effort. (2 *Stark. Ev.* 38, and note g.) The *nisi prius* case of *White v. Mattison*, (2 *Starkie*, 325,) before Lord Ellenborough, if it forms an exception to this general rule, is distinguishable from the present case; for there the defendant had called up the whole ship's crew to pay them off, and had tendered the plaintiff a specific sum, and the Court held, that the seaman might recover that sum, although the period limited by the shipping articles had not expired. There was a plain, unqualified admission of a debt to a certain amount, accompanied by an offer to pay that particular part, and the recovery was limited to the sum so admitted to be due, and did not cover the whole of the plaintiff's demand. I do

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not think that the circumstance proved in the present case, establishes the libellant's right to sue, or in any way implies that the master recognised that the libellant had been discharged from the ship, or otherwise exonerated from the restriction as to the time when he would be entitled to wages; nor do I regard it as a waiver of the advantage secured to the master by the contract.

A point of practice respecting the authority of the Court over the proceedings, as they now stand, presents itself at this stage of the cause. It was not adverted to on the argument, and, in deciding it now, for the purpose of disposing of this cause, I do not intend to preclude the further consideration of the point, should it be presented in another case. It is, whether the libel ought to be absolutely dismissed, or whether the suit may be continued as properly in prosecution since the expiration of the fifteen days.

The matter of defence now in question is no extinguishment of the libellant's claim. A forfeiture of wages has not been incurred, and no payment is established. The claimant, therefore, upon the proofs, stands justly indebted to the libellant for his services as a mariner on board the vessel. If the latter cannot recover his demand in the present action, it will be only for the reason that the claim was not suable when the action was instituted. Courts of Admiralty deal liberally with suitors in matters of practice. They give the most favorable interpretation to pleadings, in order, if possible, to support them, and, when a libel is found defective or inapt, instead of dismissing it for such cause, they will even enjoin the promovent to exhibit another libel, clear and properly articulated, in order that

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the case may be determined according to right and justice. (1 *Browne's Civ. and Adm. Law*, 2d ed. 462; *The Schooner Adeline*, 9 *Cranch*, 245, 284.) This practice should probably be considered as having relation to the form of the libel, and as coming under the principle of amendments, which are freely allowed in those Courts. (*Consett's Eccl. Prax.* pt. 3, ch. 1, sec. 1, art. 2, and sec. 2, art. 2; *The Caroline v. The United States*, 7 *Cranch*, 496; *The Anne v. The United States*, *Id.* 570; *The Divina Pastora*, 4 *Wheat.* 52; *The Mary Ann*, 8 *Id.* 380; *The Marianna Flora*, 11 *Id.* 1, 38.) Judge Peters has given a wider application to this power of a Court of Admiralty over its proceedings, than usually obtains. In *Thompson v. The Ship Philadelphia*, (1 *Pet. Adm. Dec.* 210,) he says: "In this case, although the ship had ended her voyage more than fifteen days, yet, it having been alleged, and not denied, that due diligence had been used, but the vessel could not be unloaded, I give further time for payment." The report of that case indicates a suit in ordinary progress, and the language of the Judge imports that he will stay the cause until the time shall arrive when it ought to have been commenced, and will then proceed in it as if the cause of action had been mature when the suit was instituted. I am not prepared to carry the discretionary authority of the Court to that extent. It goes far beyond all the doctrines respecting the mere correcting of defects occurring in the frame of pleadings or in the order of proceedings. It assumes that a party brought into Court without right on the part of the promovent, may still be detained there until an adequate right is acquired, or, if one is already inchoate, until it ripens for enforcement.

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When the objection is presented distinctly and in proper order, I apprehend that every Court must dispose of the controversy before it according to the rights of the respective parties as they stood when the suit was instituted. This is so at law and in Chancery, and it is not perceived that any clear principle, recognised in the Civil Code, varies the rule in tribunals which have adopted that law.

In causes of Civil and Admiralty jurisdiction, every matter of exception which goes only to delay the suit, must be urged previous to contestation of suit, (*Consett's Eccl. Prax. pt. 3, ch. 1, § 2, and ch. 2; Cockb. Eccl. Prax. ch. 6, §§ 1 to 7; Clerke's Eccl. Prax. tit. 31, 32,*) and should be singly disposed of before *contestatio litis*, or before bringing the substantive parts of the suit *ad judicium*. (2 *Browne's Civ. and Adm. Law, ed. 1799, 104, 185; Pothier, Traité de la Proc. Civ. pt. 1, ch. 2, sec. 2, art. 1.*) The matters of exception, however, which bar recovery, may, by the French practice, be urged after contestation of suit. (*Pothier, Ib. art. 2.*) So they may be, also, in Ecclesiastical and Admiralty causes at this day, though Browne questions whether such a practice was allowable in the ancient Roman law. (2 *Browne's Civ. and Adm. Law, ed. 1799, 27, note.*) The result of these doctrines seems to be this, that in all the Courts, if a party goes to trial upon the merits, he will not be permitted, after judgment, to avoid the recovery, by bringing forward an exception that no cause of action existed when the suit was instituted; but that that defence is open to him down to the time of trial, and that, if it is established, the consequence will be to turn the prosecutor out of Court. The decision of Judge Peters will, therefore, stand an

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isolated one upon this branch of procedure, unless it is to be understood as having been given before answer filed, or on a preparatory examination before the Judge, out of Court, to ascertain whether Admiralty process should be allowed. In the latter case, there may be a propriety in the Judge's deferring the award of process, or, as it is put in the case reported, giving further time for payment. I should be inclined to understand that decision as made in an initiatory proceeding, rather than in an adjudication between parties litigating in Court upon pleadings properly interposed. It does not appear to me to be consonant to the nature of actions in full prosecution, to permit them to be stayed until the plaintiff possesses himself of a right to what he demands; nor to allow him to go to judgment, against the objections of the opposite party, upon rights which have accrued during the progress of the cause and after a defence has been put in. The amendment or privilege allowed the libellant by the former order of the Court in respect to his libel, had relation to the manner of pleading and proving his demand, to bring it into a condition to be enforced. It did not authorize him to go on in this suit upon a right which was not in existence when it was brought.

I shall, therefore, not decree for these wages, although they have now become due, and although the claimant is liable to pay them. The libellant should not have arrested the vessel until his right of action was perfected; and the objection that she was not liable to arrest, having been duly taken and maintained by the claimant, must prevail. It is not intended to be decided that the same rule will necessarily apply, when the claimant gives his stipulation and makes his answer after the right of action has been perfected.

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A further question remains, namely, whether costs shall be allowed or not. If the claimant had pleaded, in a formal manner, a dilatory plea that the suit was prematurely brought, he would undoubtedly be entitled to a decree for costs. But when, instead of pleading that plea by itself, he connects it with other matters of defence which go to the whole merits of the action, and requires full proof to be produced, it becomes questionable whether he is entitled to costs. In the main defence upon which he relied he has failed, and he prevails only upon an exception in the nature of a plea in abatement. Moreover, though the libellant has failed to prove his supplemental allegation, that the vessel might with ordinary diligence have been discharged in ten days, yet he has offered some evidence upon that point, which shows that there was probable cause for his supposing that his right was perfected, depending, as it did, upon the question of a reasonable time for unloading. Courts of equity dispose of the question of costs according to the justice of the case, in the sound discretion of the Court; (*Nicoll v. The Trustees of Huntingdon*, 1 Johns. Ch. R. 166;) and Courts of Admiralty follow the same rule. I shall, therefore, in view of the general equities of the case, dismiss the libel without costs.

After a decree was entered in accordance with the foregoing decision, and in the following term, the counsel for the claimant applied to the Court for leave to re-argue the question of costs, and a manuscript decision of the Circuit Court was produced, overruling the doctrine of this Court upon the question of desertion, and holding, in effect, that absence from the vessel without

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leave, after the voyage was ended, but while the cargo was yet undischarged, was a desertion, carrying, as a consequence, the forfeiture of all wages then earned ; whereupon, in obedience to that ruling, and after hearing counsel on both sides, it was decreed by this Court that costs should be awarded to the claimant.

On a subsequent day, a motion was made by the claimant for a summary decree, and for execution upon the stipulation of the surety for costs on the part of the libellant. This was resisted, upon the ground that the decree awarding costs to the claimant was against the libellant, and did not affect his surety. The affidavit of the counsel for the claimant stated, that within a few days after the decree dismissing the libel without costs was rendered, he applied to the Court for leave to re-argue the question of costs, and that the question was subsequently argued by the counsel on both sides, and a decree was entered dismissing the libel, with costs. The affidavit of the counsel for the libellant stated, that immediately after the first decree was rendered, he apprized the surety that he was no longer liable for costs upon his stipulation ; that he, the counsel for the libellant, had no authority to waive the rights of the surety under that decree ; that, in the subsequent argument upon the question of costs, he contemplated nothing but the interest of the libellant, and supposed that the object of the claimant was to recover costs against the libellant merely for the purpose of extinguishing the wages. The affidavit of the surety stated, that he had given no consent or authority to waive his advantages under the first decree. Upon the facts proved, it was contended for the libellant that the second decree was nugatory and void, or, if not void,

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that it only availed as against the libellant himself, and that such was the understanding at the time. The counsel for the claimant contended that the second decree was valid, and carried costs against the surety, and that the question of costs was re-argued with that understanding, and he appealed to the recollection of the Court to sustain that view of the case.

Gerardus Clark, for the claimant.

Burr & Benedict, for the libellant and the surety.

BERRS, J.—The Court constantly sees the mischiefs attending efforts to carry on litigated causes by mutual understandings between the counsel concerned in them. I have uniformly declined acting upon such arrangements, unless their result was put in writing, or stated upon the minutes of the Court. Nor will I allow my own recollections or impressions as to particulars which have passed in the presence of the Court, to interfere with or control rights that may ultimately be brought up for decision. I should certainly never have allowed the argument in this cause to proceed, unless I had supposed that the whole case was under the control of the Court, and that the former decree stood suspended until a decision could be had upon the question of costs. Yet, there appears to have been no act of the Court bringing the matter within its control, or assuming cognizance of it, other than hearing the counsel for both parties upon that question.

The proposition now before the Court is, whether a Court of Admiralty, after entering a definitive decree, can, of its own authority, re-hear the cause or modify

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the decree, at any time subsequent to the term in which the decree is rendered. Although the Court proceeded, in this case, upon a supposed assent of the libellant, yet nothing appears *apud acta* establishing such assent, or concluding his rights. The proceeding in this case had all the character and effect of a re-hearing. The cause had been disposed of. No reservation of any question had been made, so as to render the decree in any respect interlocutory. A definitive decree, entered on the 26th of August, was changed by force of another decree applied for on the first Tuesday of September. The objection is now specifically taken, that it was incompetent for the Court to vacate the preceding decree in that manner.

The course of procedure in the Ecclesiastical and Admiralty Courts in England, does not furnish us with any satisfactory guide on this inquiry. The judge usually renders judgment there after summons to the party to be present to hear it. If he does not appear, there is a succession of decrees of contumacy, and then the decree passes as if by default. If he appears, he must *eo instanti* present his claims for an alteration of the decree, otherwise it becomes definitive. (*Consett's Eccl. Prax. pt. 3, ch. 6, sec. 2*; *Clerke's Eccl. Prax. tits. 232, 234.*) In the French practice, which conforms very closely to the civil, the judgment becomes perfect as soon as it is pronounced, and the judge cannot correct it after the rising of the Court, and after the register has entered the judgment upon the minutes as it was given. (*Pothier, Traité de la Procédure Civile, ch. 5, art. 2.*) The only case recognised in the early practice of the Ecclesiastical Courts, in which the same Court can revoke its sentence, is where, when the party

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is cited to show cause why sentence should not be executed, he alleges the nullity of the former decree; and this, whether the former decree was one made by another and a higher Court, or by the same Court. (*Cockb. Prax. ch. 15, §§ 8, 9.*) Such, too, appears to be the modern practice. Sir John Nicholl doubts whether the Court is competent to rescind a sentence against the wishes of the party obtaining it. And that doubt was strongly expressed in a case where a question of costs had been reserved, and where the application to open the previous decree was made on the day assigned for hearing that reserved question. (*Thomas v. Maud, 1 Addams' R. 481.*)

This principle seems to be incorporated into the practice of the Admiralty Courts. In a prize cause, Sir William Scott reserved his opinion upon the question whether he could revoke a previous decree in the cause, but under a pointed intimation that it was a proceeding wholly unknown to the Court. (*The Vrouw, 1 Rob. R. 163.*)

The ordinary rules of practice in the Supreme Court deny a rehearing of a cause after the term in which judgment is pronounced; (*Hudson v. Guestier, 7 Cranch, 1;*) and some of the cases imply a doubt whether, after a definitive judgment pronounced, the Court can revoke or reconsider that judgment. (See *The Fortitude, 2 Dods. 58, 70; Smith v. Jackson, 1 Paine, 453; Norton v. Rich, 3 Mas. 443.*) The Court of Chancery allows a rehearing, upon sufficient reasons, at any time before decree enrolled, and it has been permitted at the distance of twenty-four years from the time the decree was rendered. (*Harr. Pr. 341; Mills v. Banks, 3 Peere Wms. 8, and note.*) But this practice

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has never been introduced into the Courts of common law or of Admiralty, though I am not aware of any defect of authority in this Court to establish such a rule. The character of the suits usually prosecuted here, would, however, deter the Court from adopting that practice, unless the great ends of justice were put in hazard by withholding it. Usually, it is of the last importance to suitors here, to have an immediate despatch of their business. Seafaring men are not in circumstances to conduct protracted and reiterated litigations upon their claims, and it is usually better for their interests to have prompt decisions, even though adverse to their demands. Experience, I believe, fully justifies the remark, that whether in the Instance or the Prize Court, every delay and appeal is of serious detriment to the mariner's interest. The sum in dispute is usually small, and of immediate necessity to the suitor. It is for his interest, therefore, that the most speedy decision possible should be obtained, and that, when it is adverse to him, he should rather go immediately to his employment than linger over the contingencies of a reconsideration of his case. These views have probably led to the exclusion from Courts of Admiralty of the practice referred to; and I concur in the sentiments of the eminent men sitting in the English Admiralty and Consistory Courts upon this point, that it is a matter of great doubt whether a power of this description should be exercised in this Court, without the free consent of all parties to be affected by it. (*The Vrouw*, 1 Rob. 163; *Thomas v. Maud*, 1 Addams, 481.)

The fact of consent being expressly denied by the oath of the libellant's proctor, I cannot imply it from the subsequent proceedings, and must hold the last

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decree to be a nullity. The claimant may, however, if he wishes to have this point considered in the Court above, have the stipulation delivered up to him, to be prosecuted *in personam*.

Order accordingly.

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Courts of Admiralty in this country are not limited in their jurisdiction by the rules of the common law.

Materials furnished to a vessel in another State than that to which she belongs, create a lien which is enforced in Admiralty under the general maritime law. For materials furnished a vessel in her home port, a lien is created, if at all, only under the State law, which lien is enforced, however, in the Admiralty Courts.

Under the statute of New-York, (*2 Rev. Stat. 493*), which gives such a lien where a debt of \$50 or upwards is contracted, a debt of \$49, which, by the accumulation of interest, exceeds \$50 at the time suit is brought upon it, is not a lien upon the vessel.

A right of action *in rem*, by a material man, for supplies furnished a vessel in her home port, which is lost by a neglect to prosecute within the time limited by the statute, may still be enforced against the surplus proceeds of the vessel in Court.

This right to proceed against such surplus proceeds holds good where a party has a right to proceed in Admiralty *in personam*, though not *in rem*, on the ground that the Court has jurisdiction of the parties, and that the subject or fund is already under its control.

So a master, who has a right to sue *in personam* for wages, may proceed by summary petition against such surplus proceeds.

November, 1830.

THE steamboat Stephen Allen, a vessel plying between the City of New-York and Middletown Point, in New-Jersey, was libelled for wages, on the 24th of September, 1830, by William Tawa, a seaman employed on board of her, and, no claim having been interposed,

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she was condemned and sold, and, after payment of the debt to Taws, the surplus proceeds, amounting to \$2,400, were paid into Court. Petitions were presented by various parties for the payment of their claims out of the surplus fund. The firm of Heir, Maris & Co. claimed for wharfage, and for wood and materials furnished for the boat at Middletown Point prior to the 12th of September, 1830. Rowley, the master of the boat, claimed for advances made by him for seamen's wages, and for necessary repairs and supplies furnished the vessel prior to the 22d of September, 1830, and also for his own wages. Various material men claimed for supplies furnished and labor performed for the vessel in New-York, her home port, prior to the 11th of September, 1830. Two of these last were for sums more than \$50, (\$203 50 and \$96 76,) and two were for sums less than \$50, (\$5 62 and \$49,) though the interest upon the one of \$49, to the time of the institution of the suit, if added to the principal, would make it exceed the sum of \$50. Another petition was presented by Thomas J. Gardiner, praying that the whole of the surplus proceeds be paid to him, and that the other petitioners be postponed to him, he alleging that he was a *bona fide* mortgagee, without notice of any liens. It appeared that the vessel was registered, and that her papers were taken out, in the name of Thomas Freeborn, on the 6th of November, 1829; that, in December, 1829, Freeborn conveyed her, by an absolute bill of sale, to Gardiner; and that, on the 9th of June, 1830, she was registered in the name of Gardiner, who took the oath that he was her sole owner, and received a coasting license in the same month. Gardiner first petitioned the Court for the proceeds on the 2d of November,

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1830, and then swore that he was the sole owner of the boat. Several other claims were presented at the same time, and Gardiner's counsel thereupon asked and obtained leave to withdraw his petition, for the purpose of providing fuller evidence in support of his right as owner, which the other claimants announced would be contested. On the 8th of November, 1830, the day assigned for hearing the petitioners, Gardiner presented a new petition, as mortgagee, alleging that the bill of sale was taken by him as collateral security for a loan of \$3,000, made by him to Freeborn.

Washington Q. Morton, for Heir, Maris & Co.

Michael Ulshoeffer and *Samuel Sherwood*, for the domestic material men.

Franklin S. Kinney, for Rowley.

Gerardus Clark, for Gardiner.

BETTS, J.—The counsel for Gardiner resists the payment of the claims of the other petitioners, upon the grounds—1st. That they were never liens on the vessel; 2d. That if they ever possessed that character, it had been lost before Gardiner's rights accrued; and 3d. That the matters of the petitions are not within the jurisdiction of this Court.

The general jurisdiction of the Courts of the United States, in Admiralty and maritime cases, is not limited by the rules of the common law. (*The General Smith*, 4 *Wheat.* 438; *The Amiable Nancy*, 1 *Paine*, 111, 117.) By the civil law, vessels were liable to the claims of

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material men, and of those furnishing her with necessary supplies, as well in her home port as in a foreign one. (3 *Kent's Comm.* 168, note; *Dig.* 42, 5, 26; *Id.* 34.) And it seems that the same rule was understood to prevail in England until the jurisdiction of the Courts of Admiralty, which alone supported the liens, was taken away. (*Abbott on Shipp. ed.* 1829, 107 to 117; *The Zodiac*, 1 *Hagg.* 320, 325; 1 *Rolle's Abr.* 533; *Court de Admiralitie*, pl. 19.) In this country, the general principle is fully recognised in relation to vessels in a foreign port. (*The Eagle*, *Bee's R.* 78; *The Jerusalem*, 2 *Gall.* 345; *The Aurora*, 1 *Wheat.* 96; *Gardner v. The Ship New-Jersey*, 1 *Pet. Adm. Dec.* 223.) But it is so far modified or conformed to the rule existing in England in regard to domestic vessels, that whether there be a lien or not depends upon the local law where the lien is claimed, and not upon the general maritime law. (*Turnbull v. The Enterprise*, 3 *Hopkinson*, 171, *S. C. Bee's R.* 345; *Clinton v. The Hannah*, *Id.* 419; *The Two Friends*, *Id.* 433; *The General Smith*, 4 *Wheat.* 438; *The St. Jago de Cuba*, 9 *Wheat.* 409; *The Robert Fulton*, 1 *Paine*, 620.)

This was the home port of the Stephen Allen. The supplies furnished her in New-Jersey would accordingly, by the maritime law, be chargeable upon the vessel; and the lien which would have attached to the vessel ought in equity to be sustained in respect to the proceeds. This principle will embrace the claim of the firm of Heir, Maris & Co.

The master petitions for the satisfaction of advances made by him for seamen's wages, and for necessary repairs and supplies for the vessel. The wages would be a charge upon the vessel, and many of the other claims,

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having arisen away from her home port, would have been liens in their origin, and would have fallen within the rule just indicated, had they remained in the hands of the original creditors. The case does not require the discussion of the question whether the master could avail himself of those liens as against the vessel herself, by means of an equitable substitution in the place of those whose debts he discharged, for the questions in this case arise upon the distribution of a surplus, and his claims may be disposed of upon another principle.

The foregoing are the only claims now before the Court which, in proceedings *in rem*, would be enforced under its authority as a maritime Court, and without regard to the laws of the State. If the other claims could be entertained originally in this Court, as is intimated in *The Robert Fulton*, (1 *Paine*, 620,) the remedy against the vessel would not be under the ordinary powers of the Court, but in conformity to the statute law of the State. Those claims are for repairs and supplies furnished the vessel at her home port. The law of the State gives a lien on vessels for work done, materials and supplies furnished, &c., when the debt amounts to \$50 or upwards, and is contracted within this State. (2 *Rev. Stat.* 493.)

The claim of John Benson, for \$203 50, for work done and materials furnished, comes within the terms of the act, and might have been enforced directly against the vessel, unless the lien was lost by some subsequent occurrence.

The claim of John Patterson, for \$96 76, rests upon the same footing.

The claim of Michael Dougherty, for \$5 62, for wharfage, and that of Mersereau F. Breath, for \$49, for sup-

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plies, &c., also come within the character of debts provided for by the statute, but they are not sufficient in amount to be entitled to the privilege. Nor would the allowance of interest claimed by the petitioners in the latter case obviate the difficulty. The words of the act are: "Whenever a debt, amounting to fifty dollars or upwards, shall be contracted." Whether the debt is privileged or not, must be determined by its condition when contracted, that is, when the services are rendered or the supplies furnished, and no regard can be had to the state of the debt at any period subsequent to that time. If the debt was not a lien when it was created, it cannot become such subsequently. The sum of \$49 was, therefore, the whole amount that could come within the provisions of the statute, and that is less than the sum necessary to a lien.

The liens which might have been enforced under the statute in regard to the other debts contracted in this port, were lost by the departure of the vessel therefrom. She plied as a freight and passage-boat between New-York and Middletown Point, from about the 10th of June, 1830, to the 13th of September, 1830, prior to which last-mentioned date all the debts were contracted. By the 2d section of the State statute, the lien ceases at the expiration of twelve days after the day of the departure of the vessel to any other port within the State; and it ceases immediately after the vessel leaves the State. If the waters to Middletown Point be within the jurisdiction of this State, the lien was discharged by the operation of the former branch of this section, and, if they were wholly out of the State, then by the latter; so that, in neither case, could it now be enforced against the vessel as a substantive ground of proceeding.

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With regard, therefore, to these domestic claims, none of them can attach to the fund in Court upon the ground that they are subsisting liens on the vessel, which the proceeds, as representing her, ought to satisfy; and, if they can be now recognised by the Court, it must be upon other principles. The higher remedy once possessed by them, though not acted upon and enforced, will not, however, prevent their coming upon the surplus and remnants, as there is an express recognition of such right in the act. (2 *Rev. Stat.* 499, § 42.) In England, where the Admiralty is not permitted to have cognizance of the claims of material men, &c., a practice has been sanctioned in the Admiralty, of compensating such parties out of the surplus proceeds in Court. (*The John*, 3 *Rob.* 288.) The propriety of affording such relief here would be much more manifest, as the subject matter is within the clear jurisdiction of this Court. With us, all contracts for furnishing or refitting vessels are of a maritime character, and may be prosecuted in Courts of Admiralty and maritime jurisdiction, either *in rem* against the vessel, or *in personam* against those liable to pay. (*The General Smith*, 4 *Wheat.* 438.) I am aware of the resistance made to this doctrine in the opinion delivered by Mr. Justice Johnson in the case of *Ramsay v. Allegre*, (12 *Wheat.* 637.) That opinion was not, however, delivered as the judgment of the Court. The decision in the case was pronounced by another judge, and was concurred in by Judge Johnson, whose opinion was presented as a protestation against the jurisdiction of Courts of Admiralty, as declared in the case of *The General Smith*, (4 *Wheat.* 438,) and other previous adjudications of the American Courts. Judge Johnson labors

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to bring down the jurisdiction of our Courts to that recognised by the common law Courts in England as appertaining to the Admiralty. Whatever value, therefore, I might be disposed to place upon that opinion as a legal criticism, it cannot have the effect of overturning rules previously established in relation to this subject; nor will it justify my forbearing to apply those rules to the case now before me. It ought to be remarked, too, that as matter of authority, that opinion stands opposed by American jurists of great name, (*Abbott on Shipp. ed.* 1829, 111, 116; *Zane v. The Brig President*, 4 *Wash. C. C. R.* 453,) even if it is not to be considered as in opposition to the adjudication of the Supreme Court in the case of *The General Smith*.

Without, however, determining the right of the parties referred to, to maintain a suit here, it must now be considered as the well-established course of proceeding in the American Courts, to allow material men to be paid their claims out of surplus proceeds in Court, without regard to the fact whether they have a lien in existence or not. (*Gardner v. The New-Jersey*, 1 *Pet. Adm. Dec.* 223; *Abbott on Shipp. ed.* 1829, 111, 116; *Zane v. The President*, 4 *Wash. C. C. R.* 453.) And, in my judgment, Mr. Justice Washington, in the case last cited, places this allowance upon the true principle, namely, that the contract is, in its character, a maritime one, and may be enforced by action on the Instance side of the District Court. The remedy *in rem* may not be allowed, because not supplied by the *lex loci*; and that law will be observed in relation to the claims of material men in the home port of the vessel. But an action *in personam* may be maintained; and, as the Court has thus jurisdiction over the whole subject mat-

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ter, it will exercise it, by distributing the fund as if the claims were in actual suit. This principle does not seem to have been adverted to, in the previous cases, as the basis of the interference of the Courts with the disposition of the surplus in the registry. So far as can be gathered from those cases, the Courts appear to have assumed a *quasi* Chancery authority to dispose of such surplus according to justice, and to have supposed that this anomalous control over the funds was called for *ex necessitate rei*, and to prevent palpable injustice. Judge Washington has suggested an authority for the exercise of this jurisdiction, of a more elevated character and more consonant to the principles of our jurisprudence. To this may probably be pertinently added the suggestion, that as the funds are to go ultimately to the owner of the vessel, the Court will not exercise its discretion in delivering them to him, until justice is done to others who have claims of a maritime nature subsisting against such funds. The act of the Court becomes purely judicial, and has relation to a subject and to parties all within its jurisdiction. If there is danger of injustice being wrought by decreeing upon summary petition, it will be competent for the Court to require the claimant to commence his action, and the fund would be detained, to abide the event. The determination of the right and the disposition of the money would be made by the same tribunal, and the Court could thus see, both that full justice was measured out to all parties, and that no unreasonable delay was allowed.

The claims before adverted to, being all of them suable in Admiralty, the Court, in the exercise of the broad equity with which it is clothed, will consider them entitled to the advantages which they would have

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possessed had suits been in actual prosecution in this Court for their recovery, and will order their amounts to be satisfied out of the surplus in this Court, unless the petitioner, Gardiner, has a priority of claim.

The master's claim for his own wages will be placed upon the same footing. It was intimated by Mr. Justice Livingston, that a master might sue in Admiralty, *in personam*, for his wages. (*The Grand Turk*, 1 *Paine*, 78.) The express point has since been decided by Mr. Justice Story, on full consideration. (*Willard v. Dorr*, 3 *Mas.* 91.) The master's equity will, accordingly, be the same as that of the other claimants who have no actual lien.

It is, however, urged, that if these claims may come upon the surplus, they are to be postponed to that of the petitioner, Gardiner, who is alleged to be a *bona fide* mortgagee, without notice of any liens. I shall not now consider what rule of allowance ought to obtain between a mortgagee and parties situated as these claimants are, where each applies to the equity of the Court to be satisfied out of funds not produced by their own acts, or by means of incumbrances belonging to them, and which lie in the registry, subject to be delivered to the legal owners at the discretion of the Court; for I shall decide that, with regard to all the creditors of the vessel who are now contending with him for the fund, Gardiner must be considered as her owner, and as possessing only the rights of an owner. The facts in the case show that he should be estopped, as it respects the other petitioners, from denying that he was owner, and from assuming the character of mortgagee, even if the original transaction was a mortgage as between him and Freeborn, which,

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under the circumstances disclosed, there is great reason to question. I feel compelled to remark further, that the evidence before me gives occasion for a strong presumption that Gardiner has no interest personally in the matter, but has allowed himself to be made use of to cover the interests of some party who keeps himself in concealment.

Decree accordingly.

THE AMERICA.

Where a seaman is unlawfully discharged during a voyage, or is compelled, by the cruelty of the mates, to leave the vessel, from a regard to his personal safety, he is entitled to full wages for the entire voyage.

November, 1830.

THIS was a libel *in rem* for wages. The defence was desertion and forfeiture of wages. It appeared that the libellant shipped for a voyage from Savannah to Liverpool, and thence to New-York. At Liverpool he left the vessel, and the claim was for wages out and home.

It was proved that the libellant, who was the carpenter, was severely and unjustifiably beaten by the mates, and that he left the vessel in consequence. The first mate, on the same day, stopped his board on shore, and, one or two days afterwards, when he came down to the side of the vessel, forbade his coming on board. The entries in the log, in regard to the libellant's going on shore, were interlined with the words "without leave," several days after they were first made.

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BETTS, J.—The evidence in this case establishes, that the carpenter left the vessel at a foreign port, because of inhuman treatment. He was afterwards refused support by the ship, and forbidden to come on board, and was not logged in the way directed by the statute to establish the fact of desertion.

The amount which a seaman can recover for a wrongful discharge in a foreign port, will vary to some extent with the circumstances of each particular case; but, ordinarily, he is entitled to the full wages of the voyage. The suit is usually brought for wages, and, under that name, Admiralty awards a compensation commensurate to the injury sustained. The libellant in this case claims wages for the voyage out and home. It appears that he was obliged to procure a passage home in another vessel, and that he earned no wages on the voyage back. The 42d article of the Laws of the Hanse Towns (1 *Pet. Adm. Dec. App.*) provides, that if the master discharges a seaman during the voyage, for no lawful cause given, he is bound to pay him his whole wages, and defray the charge of his return. So the laws of Oleron, article 13, and those of Wisbuy, article 25, (1 *Pet. Adm. Dec. App.*) provide, that a seaman unlawfully discharged may follow the vessel to her port of destination, and recover such wages as he would have been entitled to if he had remained by the ship until the end of the voyage. The conduct of the mates in this case amounted to such a discharge; and, even if it did not, the libellant was justified in leaving the vessel from a regard to his own personal safety, (*Limland v. Stephens*, 3 *Esp.* 269; *Ward v. Ames*, 9 *Johns.* 138; *Relf v. The Maria*, 1 *Pet. Adm. Dec.* 193; *Rice v. The Polly and Kitty*, 2 *Pet. Adm. Dec.* 420,) and

The Pacific.

comes within the spirit of the articles which have been cited. (See *Emerson v. Howland*, 1 *Mas.* 45.) He is entitled to full wages for the voyage out and home.

Decree accordingly.

THE PACIFIC.

Where a seaman, a native and subject of Hayti, had shipped in that country for a voyage "to New-York," and the master had given security to return him to St. Domingo, the port at which he shipped: *Held*, that he could not sue in New-York for his wages, no special cause being shown for his suing, or for his leaving the vessel, the vessel being about to return to St. Domingo, and the master offering him a passage.

The question of the right of a seaman to sue his vessel or its officers in a foreign port, considered.

December 10th, 1830.

THIS was a libel *in rem* for seaman's wages. The answer alleged that the master was bound to return the libellant to St. Domingo, and that the wages were not due until his arrival there; and it was so stipulated in the shipping articles. The libellant was a native and subject of Hayti, and shipped there, conformably to the laws of that country, for the present voyage. The shipping articles were authenticated before public functionaries of that country, and the master was required to give security to return the seamen, though the voyage was described in the articles as "to New-York."

BETTS, J.—The voyage in this case is not broken up or discontinued, the ship being bound back to her home port, and no special cause has been assigned by

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the libellant for leaving the ship or for bringing this action. The master has given security to return the libellant to St. Domingo, and the Court cannot say what is the import of the shipping articles by the laws of Hayti, or whether the municipal laws of that country do not impose reciprocally upon the seamen the obligation to return. The articles themselves do not require the seamen to remain by the ship, nor do they authorize them to leave at intermediate ports. On these points they are silent, requiring, however, in case of the death or desertion of a seaman at a foreign port, that the master shall procure a certificate of the fact from competent authorities at the place where the death or desertion shall occur.

There are obvious objections to allowing a suit like this to be brought at an intermediate port, (as New-York must be considered, though the articles do not expressly show it,) when the seaman's remedy will be open to him on his arrival in St. Domingo, and when no particular reason exists for his suing here. It cannot be a matter of right for a seaman to maintain an action for wages in a foreign port against his ship. It may be, that the laws of his own country or his shipping contract may secure to him the privilege of claiming wages at each port of delivery on the voyage. Still, it would be a matter of comity and not of obligation with foreign tribunals, whether they would take cognizance of the demand. Maritime Courts are not considered open as of right for a foreign seaman to prosecute his ship or its officers, on causes of action arising out of the voyage or out of his contract; and, upon high considerations of policy affecting the trade and navigation of all commercial communities, an action

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calculated to impede or break up a voyage, and probably cause the sale of the ship abroad, will not be entertained in favor of a seaman whilst he is connected with his vessel, except in most urgent cases. (*Gardner v. Thomas*, 14 *Johns.* 134; *Johnson v. Dalton*, 1 *Cow.* 543.) If a seaman is discharged and left destitute in a foreign port, the judicial authorities there might afford him the means of compelling his ship or its master to satisfy his dues, or render him compensation for his wrongs. (*The Courtney*, *Edw. R.* 239.) But this case is not of that character. Upon the facts as they appear, and since the vessel is about to return, and the master offers a passage to the libellant, I shall dismiss the libel.

THE GUSTAVIA.

Impertinent and irrelevant allegations in an answer stricken out on motion.

Whether supplies furnished to a vessel are necessary, is a conclusion of law, and the claimant, in answer to a libel by a material man, is not required to either admit or deny that the articles furnished were necessaries.

A master may hypothecate his vessel for necessaries in a foreign port, unless he has at his command funds or credit of his owner.

A ship's broker has a lien on a foreign vessel, in the nature of the lien of a material man, for services in shipping a crew for the vessel, and for advances for their wages.

But he has no lien on the vessel for services in drawing a contract between the owner of horses shipped as part of her cargo and hostlers who accompanied her to take care of the horses.

Seemle, that it is not necessary for a material man to show that the supplies furnished to a vessel by him were actually necessary for her. If they were furnished at the request of her master, they create a lien on her, although they exceed her actual need, provided there was no *mala fides*, or collusion on the part of the material man.

December 28th, 1830.

THIS was a libel *in rem* by a ship's broker against the *Gustavia*, a foreign vessel. The master was under

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the necessity of shipping a new crew in New-York, and, not speaking English, employed the libellant to procure the crew, and make the necessary advances to them, and have them on board on a day specified. The expenses of shipping the crew, and drawing up the shipping articles, and advancing a month's wages, were laid at \$254, and for these materials and necessaries the libel was brought.

It appeared that the crew were presented to the master, at the vessel, according to the contract, but that he was not ready to sail, and, for some reason not put in proof, declined receiving them, and they dispersed. A few days afterwards the master called on the libellant, and demanded of him a fulfilment of his contract, and gave notice that if the men were not furnished by the next day he should employ another person to ship them. The libellant refusing to have anything more to do with the business, unless his advances were repaid and compensation was made for his services, the master obtained the crew by other means; whereupon the libellant instituted this suit.

One of the items contained in the schedule annexed to the libel was for drawing a contract between the owner of the cargo and two hostlers who were to accompany the vessel to take care of some horses on board.

Exceptions were taken to several allegations in the answer as impertinent and irrelevant, and to the answer itself, as neither admitting nor denying that the articles furnished were necessaries. The several allegations excepted to were stricken out on motion, after argument, without costs; but the Court held, with reference to the exception to the answer itself, that

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the furnishing of all the articles was either admitted or denied, and that whether they were necessities or not was a question of law. The exception was therefore disallowed.

Erastus C. Benedict, for the libellant.

Thomas L. Ogden, for the claimants.

BERRS, J.—By the well-settled principles of maritime law, a vessel is liable for necessities furnished to her in a foreign port. The civil law gave a lien in such cases, without regard to the domicil of the owner; and the same rule substantially prevails in this State, though, in the case of domestic vessels, the remedy must be under the local law, and not in conformity to the general maritime law. (*The Robert Fulton*, 1 Paine, 620; *The General Smith*, 4 Wheat. 438.) By the term *necessaries*, the law does not contemplate those things only which are indispensable to the safety of the vessel and her crew. But, whatever a prudent owner, if present, would be supposed to have authorized, the master may order, and the vessel will be held responsible for them. (*Webster v. Seekamp*, 4 Barn. & Ald. 352.)

The necessity and propriety of shipping a crew in this case, at this port, are not questioned; nor is it denied that the services of the libellant were rendered in procuring them; but it is supposed that he has no remedy against the vessel for his demands. The contract has all the constituents of a maritime contract. It had respect to the equipment of a foreign vessel for sea-service, and may, accordingly, be prosecuted in this Court, and carry with it the privileges appertaining to

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suits by material men. Nor can it be considered as made exclusively upon the responsibility of the master. He was not only a foreigner and a stranger to the libellant, but was wholly unknown in this port. No guarantee of the contract was asked or received, and the implication would, therefore, be exceedingly forcible, that the libellant did not intend to waive any security the law might afford him in respect to the matter of his undertaking.

The objection to the remedy against the vessel most relied upon is, that a case is not made out in which the master could have subjected the vessel to this claim by an express hypothecation. To enable him to exercise this power, it is supposed the proofs must show that he had no funds or credit, by means of which he could have satisfied the demand, and that, accordingly, it had become an act of extreme necessity for him to hypothecate the vessel. The objection also assumes, that a lien by implication can never arise, except in cases where the master might have given one directly. This Court has heretofore had occasion to examine the point as to the power of a master to hypothecate a vessel, without its being shown that he had no funds of his own adequate to supply her wants. The conclusion arrived at was, that he might do so, unless he had means of the owner under his control, and that he was not bound to advance his own moneys. (*The William and Emmeline*, ante, p. 66.) Under this doctrine, it would be useless to inquire whether the master possessed funds of his own, out of which these expenses might have been satisfied, inasmuch as, if he had them, it was at his option whether to apply them to the use of the vessel or not. There is no evidence that he had any funds of the owner, or

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that the owner possessed any credit in New-York, to either of which resort might have been had to meet this demand; and, upon the evidence before me, I am satisfied that the owner had neither funds nor credit at New-York, within the control of the master, which might have supplied the means of discharging this claim without resorting to the ship.

But, it appears to me that the right of the libellant to a lien rests upon higher principles than these. The libellant is in the place of a material man, and possesses the privileges of one who has furnished a foreign vessel with necessary supplies. The law secures his claims by giving them a privilege against the ship itself. The moment the services were rendered, the privilege was perfected; and I am not aware that any thing *inter alios acta*, could, independent of the libellant's assent, divest that right without satisfaction of it. It does not appear to me the objection can be maintained in such cases, that the master was furnished with funds to meet all necessary disbursements, and that the only remedy is upon those funds, or against the master personally.

Nor, in a case requiring the decision, should I be inclined to exact proofs from material men that the supplies furnished or services rendered by them, at the request of the master, were actually necessities. This, from the nature of things, must be a matter left to the judgment of the master. All the cases recognise him as the agent of the owner, clothed, by implication of law, with the authority of the owner in respect to the employment and refitment of the vessel; and, unless the party dealing with him acts with a knowledge that the master transcends his powers, or colludes with him to defraud the owner, I am not aware of any

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Facts and circumstances considered, which were held to have constituted an authorized absence of seamen from their vessel, and not a wilful desertion.

In a case of disobedience by a seaman to the master, his wages for one-half of a month were deducted by the Court from his pay, and, in a case of insolence, wages for one month were deducted, as mulcts for misconduct.

If, a master degrades a cook for incompetency or misconduct, his decision will, in ordinary cases, be considered as final.

It is the duty of a master to see personally that his crew are provided with a sufficient quantity of provisions.

In an action by seamen for compensation because of a short allowance of provisions, if the fact of short allowance is proved, the burden of proof is on the owner of the vessel, to show that she had on board the quantity of provisions required by statute.

In actions for seamen's wages, interest will, as a general rule, be allowed from the time the wages were due, until a tender or payment under the decree of the Court.

Interest will be allowed only upon regular wages, and not upon extra wages recovered by way of compensation for short allowance.

In actions for seamen's wages, counsel fees will not be allowed as costs, unless the defence is merely vexatious, or there are special reasons for the allowance.

January 25th, 1881.

THIS was a libel *in rem*, by the crew of the ship Elizabeth Frith, against that vessel, to recover their regular wages, and also extra wages, under the 9th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 135,) on account of their having been put on a short allowance of food, and also the value of small stores, under an allegation in the libel that the master had expressly contracted to furnish such stores, but had failed to do so. Part of the libellants shipped at Portsmouth, New Hampshire, for a voyage to Charleston, thence to London, and back to a port of discharge in the United States. Others shipped at Charleston, and others at London, for the residue of the voyage.

The master, who was part owner of the vessel, put in a claim and answer for himself and his co-owners, setting up various defences as to the different libel-

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lants. To this answer, two exceptions were interposed. First, for irrelevancy in one of the articles, in stating that the proceedings before the Justice "were had on the —— day of June, and before the ten days after the said ship had been safely moored, or the said libellants had in any other manner become entitled to take proceedings to recover the aforesaid wages." Second, for insufficiency in the answer, in neither admitting nor denying that the libellants were put on short allowance, and in not stating with certainty the quantity and quality of their allowance, nor the quantity and quality of provisions secured under deck, according to the act of Congress, but only that such quantity and quality of provisions was secured, &c., as is required in and by said act, "according to the true intent and meaning of said act." On the hearing of the exceptions it was contended, on the part of the claimants, as to the exception for irrelevancy, that it sufficiently appeared what day in June was intended; that it was distinctly averred that ten days had not elapsed, and that the libellants were not entitled to institute a suit; and that the article, if at all exceptionable, could not be excepted to for irrelevancy, but only for insufficiency; and, as to the other exception, that the answer set forth the amount of provisions secured under deck, with the same degree of certainty as the libel.

Edwin Burr and *Erastus C. Benedict*, for the libellants.

Gerardus Clark and *Henry M. Western*, for the claimants.

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BETTS, J.—This case comes up on exceptions to the answer. The points raised by the exceptions are: 1. Whether an averment in the answer that proceedings were taken by the seamen before a Justice of the Peace, preparatory to the formal commencement of this action, prior to the expiration of ten days after the arrival of the vessel, is irrelevant. I do not propose now to enter into a discussion as to the pertinency of this averment, as the point is substantially before me for adjudication in another cause. As that case may be decided upon other grounds, I am disposed to leave the present one in such situation that the subject may be properly brought before the Court, and directly determined, either in this or in an appellate Court. The counsel for the libellants is in error in supposing that this point was decided on exceptions in another case. I have looked into the papers in the case referred to, and find that the matter there ruled to be irrelevant was an averment that in the proceedings before a Justice of the Peace an offer was made by the owner to pay the wages claimed, and a statement of the reasons why that offer was not fulfilled. The distinct point was not raised, that the Justice had proceeded in the case without jurisdiction. Had the present exception been taken for insufficiency, I should have sustained it, as the answer does not set forth enough to negative the jurisdiction of the Justice in the matter, even though the proceedings before him may have been taken within ten days after the arrival of the vessel. Disposing of the point upon the exception as taken, I shall not rule this averment out of the answer for irrelevancy, although it is imperfectly pleaded.

2. The other exception must prevail. The libel char-

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ges that the seamen were put upon short allowance, and that the quantity of provisions required by statute had not been shipped previous to the sailing of the vessel. The answer neither admits nor denies the allegation as to short allowance. It asserts that the crew were supplied with "such a reasonable and proper quantity of good and wholesome provisions for their support, as was consistent with a prudent regard to the probable length of the voyage, and the safety of their lives and those of one hundred and forty passengers on board, and that there is no just cause of complaint as to the allowance of bread and other provisions." This averment is too loose and indistinct to supply the evidence for which the libellants called, nor does it comport with the principles of good pleading, independent of its inadequacy as a discovery and as proof to be used on the hearing, for it does not set forth the facts which it claims to amount to a compliance with the statute, and avers that the acts of the master were a sufficient justification, without stating what those acts were, and without submitting them to the judgment of this Court. This would be palpably bad as a plea, and, when an answer is used as a bar to an action, it should contain the substantial ingredients of a plea in bar.

The other branch of this exception is equally well taken. The claimants must answer precisely whether they had shipped the quantity and quality of provisions required by the statute. Their answer is coupled with a qualification which renders it indefinite and uncertain.

The first exception is disallowed, and the second is allowed, with costs.

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The answer of the claimants, upon the merits, did not deny the balance of wages claimed by the libellants to be due, but set up various matters of defence constituting a forfeiture of wages by portions of the crew, namely, that the cook, one of the libellants, had been turned out of his post for ignorance and intemperance; that Rickers, another of the libellants, pretended to be sick during the voyage, for the purpose of escaping work, and did avoid work under that pretence; and that all the other libellants, except Anderson, but especially Foy and Davis, had been guilty of various acts of insubordination, amounting to mutiny. It also averred that all the libellants had incurred a forfeiture of their wages, by deserting the vessel before her cargo was unladen, and denied the fact of short allowance, and that there was any contract to furnish the crew with small stores. The facts, as proved, are sufficiently set forth in the opinion of the Court.

BETTS, J.—The answer in this case is drawn very inartificially and indistinctly, and is so wanting in precision that it would not, in any event, be entitled to operate as evidence for the claimants, if, under the rules of Admiralty pleading, it could become so. It amounts to no more than a plea putting in issue the demands of the libellants. Exceptions were originally taken to it, and were most of them sustained by the Court, but it seems that, to avoid the delay of perfecting the answer, the proctors for the libellants have waived the decree upon the exceptions, and both parties have consented to go to hearing upon the answer as it stands. *Valeat quantum valere debet.*

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The defence set up with regard to the whole crew, namely, that they have incurred a forfeiture of their wages by desertion, will be first considered. The libellants allege that the vessel arrived at this port, and was safely moored, on the 1st day of June last, and that they were all discharged on the third day thereafter. The answer admits the arrival, but denies that the vessel was moored until the 3d day of June, and also denies that the libellants were discharged on the 3d day of June, or before, or since, and avers that they wilfully deserted before the cargo was unladen, and before ten days had elapsed after the vessel was moored, and that, by force of the laws of the United States, and of the shipping articles, and of certain entries in the log, their wages had become forfeited.

The course of decision obtaining in this Court upon the subject of desertion has been, that the desertion by a seaman in the merchant service which produces a forfeiture of wages as the necessary and inevitable consequence, being an offence specifically defined by statute, (*Act of July 20th, 1790, § 5, 1 U. S. Stat. at Large, 133,*) and the mode of proof being also prescribed by statute, the party setting up such offence is bound to make it out in conformity to the act of Congress; and that, accordingly, neither by the usages of maritime law nor in consequence of stipulations by seamen in their shipping articles, can a desertion in the sense of the statute exist, so as to carry an absolute forfeiture of wages, unless the act is brought within the terms of the statute and is proved as therein directed. (*The Martha, ante, p. 151; The Cadmus, ante, p. 139.*) So, with respect to the various engagements of seamen in their contracts, that if they do or refuse to do certain

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acts, they shall forfeit their wages, this Court has always held such stipulations to be in the nature of penalties, and therefore subject to the discretion of the Court as to the degree and extent to which they will be enforced. This doctrine has been frequently applied to the case of seamen leaving their vessel, or refusing to unload her in her port of discharge, after the nautical voyage is terminated. If the service terminates at that port, I have held that the provisions of the act do not apply, as desertion can occur only during the continuance of a voyage, and the voyage is ended, within the intendment of the maritime law, when the vessel is safely moored in the port of discharge and is ready for unloading, although the seaman may be bound by his contract to unload the cargo, or perform other labor, or remain on board for a fixed period of time afterwards. (*The Martha*, ante, p. 151; *The Cadmus*, ante, p. 139. See, also, *The Baltic Merchant*, 1 *Edw. R.* 86; *Brown v. Jones*, 2 *Gall.* 477, 482.) The refusal of the mariner to fulfil such an engagement might be punished by withholding the full amount of his wages; yet this penalty rests in the discretion of the Court, and is not that absolute forfeiture of wages which is prescribed by the statute, and which, when incurred, must be pronounced without regard to the demerits of the seaman or to the injury suffered by the owner. (*Act of July 20th, 1790*, § 5, 1 *U. S. Stat. at Large*, 133.)

So, also, it has been decided by this Court, that if a vessel makes this her port of discharge, and the seamen go on shore without leave, but return within forty-eight hours, and are within the control of the master, although they refuse to assist in unloading the vessel or in doing duty, such unauthorized absence or violation of duty,

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though a misfeasance, and subject to punishment by abstraction of wages, is not the desertion which necessarily works a forfeiture of wages. (*The Cadmus*, ante, p. 139.) On appeal to the Circuit Court, this point was ruled otherwise, and it was held that an absence without leave, or a refusal to remain on board or to do duty, was a desertion according to the principles of maritime law, and carried with it an absolute forfeiture of wages, and need not be proved in the mode pointed out by the statute. If that decision is to be understood, as was urged on the part of the claimants on the argument, as laying down the doctrine that every absence of a seaman, which, in a maritime sense, may be termed *desertion*, and be punished as such, has now necessarily the statutory punishment affixed to it, the operation of the rule upon seamen who may have done their duty faithfully during an absence of years, however severe and out of just proportion to the offence, cannot now be regarded by this Court. The rule declared by the Court to whose decisions it is both the wish and the duty of this Court to submit, will be conformed to implicitly, and will be in no way disregarded in this case, because, in my opinion, this case stands upon ground not touched by the judgment of the Circuit Court in the case of *The Cadmus*. The distinction between that case and the present one is, that in the former the term for which the seamen had shipped did not expire at this port. They were bound to continue with the vessel either until her return to one of the Eastern States, or for a fixed period extending several months beyond the time of her arrival here. This port was accordingly one of transit in the voyage, and the seamen were under the same obligations to the ship here as in a foreign port. Desertion during the

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course of the voyage may carry with it, according to the doctrines of the law maritime, a forfeiture of wages, which may be exacted to the utmost extent, although it is understood that it is not imperative upon the Court to pronounce that judgment alone. The error of this Court in *The Cadmus*, which was corrected by the decision of the Circuit Court, seems to have been in construing the act of Congress as superseding, in this particular, the law maritime, and as supplying the entire rule by which a statutory desertion, authorizing a forfeiture of wages, could be established, and in holding that, to constitute such desertion, there must be a continued and actual absence from the vessel, and that, if the sailor was on board, or within the control of the officers, his refusal to do duty could not be treated as a desertion which carried a forfeiture of wages as the specific punishment to be inflicted. But, supposing the rule to be carried further by the Circuit Court, and to be now settled by the decision referred to, that any unjustifiable absence of a seaman from his vessel in a home port, before the voyage is ended, amounts to a desertion, which, without regard to the statutory proofs, must be visited with a forfeiture of wages under the law maritime, it would yet remain an open question, not covered by that decision, whether a mariner, leaving his vessel after the voyage was ended, would be deemed guilty of desertion.

Moreover, if that decision embraces the latter position, and an unauthorized absence of the sailor from his ship in her home port after the voyage is terminated, but before he is entitled to demand his discharge under his contract, is a desertion which forfeits his wages, yet, in my judgment, sufficient proof has

been offered by the libellants that their absence in this case was not unauthorized by the master. The vessel had no cargo. She brought passengers only. She arrived in this port on the 1st of June, and was made fast to the wharf on the 3d. The mate permitted the crew to go ashore and procure dinner, with orders to them to return. Most of them returned that afternoon, and worked until six o'clock in clearing decks. On the following Friday, they took their effects, in the presence of the master, had them all examined, and left the vessel with his knowledge. He told the men he would pay their wages the next week, and neither he nor the mate made any objection to their going on shore, nor gave any command or request that they should return. There was nothing more to be done on board. The ballast was not to be discharged, and the passengers had all, except one, left the ship. It appears to me that the absence of the libellants, under such circumstances, cannot, with any propriety, be declared a wilful desertion. They could not have maintained a right to continue with the vessel, and to render her liable for wages, after the voyage had ended, and after all occasion for their services was determined. The attempt to turn their act into a criminal offence, subjecting them to the loss of all their wages, rests upon mere technicalities, and is destitute of all color of equity. Indeed, it appears to me that this claim of a forfeiture of wages is an afterthought, got up since the seamen undertook to collect them by process of law. I shall overrule this branch of the defence.

The payment of wages is also resisted on the ground of larceny, and disorderly and mutinous conduct by the crew on the homeward voyage. The answer upon this

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point is exceedingly ambiguous and indefinite, and, as to all the crew except Rickers, Foy and Davis, is clearly so defective in substance as to debar the claimants from offering any evidence under it. Indeed, there would be good ground for excluding all testimony in relation to the misconduct of any of them except Davis, because of the loose and indistinct manner in which the claimants have alleged these matters in their answer. The observations of Judge Story upon this subject, in *Orne v. Townsend*, (4 *Mas.* 541,) are replete with sound legal criticisms, and I should have felt well sustained by authority if I had refused to hear the proofs read. But, as this course would probably only have led to procrastination, and to a petition for leave to amend, and as the libellants appeared to have apprehended what the claimants meant to charge against them, and had produced all the evidence they wished to offer upon that subject, I conceived it to be better to allow the proofs to be read, and, if practicable under the pleadings, to settle the whole controversy between the parties in conformity to the facts presented by them.

The charges specified against Rickers, Davis and Foy are, that Rickers feigned indisposition, and thus avoided doing his duty during the whole passage from London to this port, and encouraged a spirit of mutiny in the crew; that Davis disobeyed the master's orders, and struck or kicked him; and that Foy used insolent and mutinous language to the master. The weight of evidence is decidedly against the imputations made by the answer on Rickers. His indisposition was real, and he is proved to have been unable to perform his duties on board the vessel. There is no shadow of evidence in

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support of the loose suggestions that he gave countenance to a mutinous disposition in the crew; nor do I perceive any evidence that such disposition existed among the crew, other than that the men freely expressed their dissatisfaction at being put on short allowance. This was not accompanied by any threats or disrespectful language, or by any act of insubordination on the part of the crew generally.

The master received a blow from Davis, and, though one witness states it was given deliberately by Davis, whilst lying in his berth, yet the clear preponderance of proof is, that it was given by a kick whilst the master, the mate and a passenger were hauling him by force up the fore-castle in the dark; and the circumstances render it as probable that it was given at random in the struggle in which the parties were engaged, as that it was designed against the master. The evidence with regard both to Davis' acts and to the conduct of the master, is exceedingly contradictory. The master does not seem to have considered the blow at the time in the light he would now have the Court view it. After being overpowered, Davis went submissively to his duty, and no further notice was ever taken of the occurrence, until it was set up in this action in bar of wages. The master appears to have thought that Davis had received an adequate correction at the time; for, after it was over, he admonished him, that though it was in his power to confine him in irons for what had been done, yet he should not do it. Davis, before and after that, conducted himself unexceptionably. His actual offence was, that he disobeyed the positive orders of the master to come on deck. This was a plain violation of his duty, and the Court cannot permit it

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to pass without animadversion. Seamen can never be permitted to debate the reasonableness and propriety of the orders given by their officers. Their duty is, to obey implicitly every lawful command. The Court will see them properly recompensed for any unnecessary oppression or severity in the conduct of their officers; but it will not tolerate any hesitation in a prompt and active obedience to orders on board. Davis, having performed his watch and retired, was called into another watch before his regular turn. The master alleges that this was done for the purpose of a new organization of the watch. The Court does not go into an examination of the testimony offered to prove that the order was unnecessary, or oppressive upon Davis. The master could, at his discretion, re-organize the police and service of the ship, and the seamen were bound to obey his orders without resistance or murmuring. The Court cannot uphold the notion with sailors, that they can refuse to obey an order of the master because they suppose he requires a duty not necessary at the time, and will, accordingly, in this case, mark the impropriety of Davis' conduct by an abatement of his wages. In regarding all the circumstances of the case, I should have been better satisfied if, the discipline of the vessel having been established, and the sailor having fully submitted, the master had adhered to what was evidently his first intention, and had considered the difficulty terminated at the time by the slight punishment of Davis for disobeying the orders of his officers. But, as the master did not distinctly pardon the offence, I shall, upon the ground that an offence has been committed by Davis, which is not justified or condoned, direct a deduction from his wages of his pay for one-half of a month.

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Foy, in his remonstrance with the master against the short allowance, conducted improperly and insolently. He had a right to make known the wants of himself and of the crew, but it should have been done in a manner and in language more respectful. His deportment tended to promote insubordination and disorder; and, as a punishment for this misconduct, I shall direct his wages for one month to be deducted from his pay. I adopt this mild punishment because I am satisfied the altercation was unpremeditated, and because the chastisement shortly after inflicted on him, and which, the mate says, was for this same impertinence, and which he submitted to unresistingly, seemed then to be regarded on all sides as ending the affair, so far as the vindication of the master's authority was concerned. Foy performed his duty unexceptionably from that time, and no recollection of any misconduct seems to have been cherished by the master. He consented that all the men should leave the vessel, and promised that all, without exception, should be paid the next week. The offence had, in effect, been forgiven, and it is now too late for the master to recall such an instance of irregular and insubordinate conduct in the course of the voyage, in order to make it the foundation of a forfeiture of wages. Under these circumstances, I do not think justice demands, in any of these cases, more than that degree of punishment which shall serve to admonish the seamen that the Court will not, except in cases of most imminent and irresistible necessity, countenance any act of insubordination from the crew towards their officers, at sea and in the discharge of their duties.

The imputations thrown out by the answer, that the

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crew had embezzled property belonging to the passengers, and that a spirit of mutiny was fomented amongst them, are unsupported by proof.

I shall accordingly decree in favor of all the libellants for the wages in arrear; and, indeed, except as to Rickers and Foy, I do not perceive any ground for a denial of full wages to the crew.

The cook was properly degraded, and can only recover wages for the duties he performed, namely, those of an ordinary seaman. His competency and conduct in the station of cook were matters for the master to decide upon, in the first instance; and, where he has decided without partiality and upon the evidence before him, I should look for a very strong case, to justify a disregard of his determination. There seems to have been strong proof before the master that the cook was intemperate, and ignorant of his business; and, whether the charge was established by the kind of evidence given or not, the master was justified, under the exigencies of the case, in degrading him from his place, on reasonable grounds for belief that he was intoxicated when employed in cooking, or was an incompetent or unsafe man to entrust with that situation.

With regard to the claim for extra wages, on the ground of a short allowance of provisions, the testimony of the libellants is explicit, that the crew were kept on a short allowance of bread during most of the passage from London here. Rickers and Anderson have no interest in this question, and, whatever distrust might be felt as to the evidence given by the other witnesses, there is no legal reason for not giving full credit to those two. There was great remissness on the part of the master. He contented himself with or-

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dering the men to have one pound of bread each daily, and the mate, after seeing it weighed once, left the matter to the steward, who furnished the quantity by guess, and in a manner, as proved by Rickers, which must necessarily have given a deficient quantity. As the master knew, at an early day, that the men complained of the want of bread, he was bound to see personally that the proper supply was furnished them. The Court will not determine what that quantity should be by weight. The Navy ration of bread is fourteen ounces, together with a fair supply of other stores. Without such stores, that quantity of bread might be inadequate. Whether the pound ordered to be furnished consisted of twelve or sixteen ounces is not shown; but if of either, and insufficient for the comfortable provision of the crew, the master should have seen that it was increased, or other proper provisions furnished in its place.

Judge Peters has construed the act of July 20th, 1790, (1 *U. S. Stat. at Large*, 131,) which gives a day's extra wages to a seaman for each day he is kept on short allowance, as authorizing the increase of wages only in case the required quantity of provisions is not on board the vessel. He held, that if the vessel had the complement of stores, it rested in the discretion of the master how they should be distributed, and that, in such a case, the remedy for being put on short allowance must be by an action for damages. (*Mariners v. The Washington*, 1 *Pet. Adm. Dec.* 219.) It does not now become necessary to consider whether the act may not justly bear a more enlarged interpretation, because the fact that the crew were on short allowance being proved, it is necessary for the master, in order to bring

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himself within the privilege of the construction referred to, to prove that his vessel had on board the legal quantity of provisions. This has not been done in the present case. I shall consider the short allowance as commencing on the 20th April, and continuing through the voyage. The exact period is not fixed by the testimony, the witnesses differing among themselves upon this point. I adopt the evidence of Graves, as referring to a fact which he would be very apt to recollect. He says the short allowance began four or five days after he was removed as cook. He thinks he was removed on the 10th of April, but other evidence shows it was on the 15th. The uncertainty as to the commencement must operate to the disadvantage of the libellants, and they can only have an allowance for the shortest of the various periods named.

There is no foundation in the proofs for the claim on the part of some of the libellants, in regard to small stores. No contract to furnish them is shown; and, if such a contract existed, it is exceedingly doubtful whether recompense for a breach of it could be had in this way. This branch of the claim is disallowed.

Decree accordingly.

The cause afterwards came up again on a motion of the proctor for the libellants, that interest be allowed on all the sums decreed to the libellants from the time payment was demanded, and that a counsel fee be included in the costs. The motion for interest was resisted on the ground that the amount due the libellants was not a liquidated sum, until fixed by a decree of the Court, and because the libellants connected with their claim for wages one for compensation for short allow-

ance, which must of course be litigated, and which was only in part sanctioned by the Court.

BETTS, J.—Interest is usually allowed upon seamen's wages from the time a demand of them is made. Here was a fixed period for payment, which had elapsed before suit was brought, and also an actual demand. Without such positive demand, the commencement of the suit would have been an adequate demand, in construction of law, to entitle the party to interest. (See *Gammell v. Skinner*, 2 Gall. 45, 46.)

There is great fitness in such allowances to seamen, as the master, being their account-keeper, always knows precisely the sum due them, and ought to tender them payment when their right to demand it has become perfect. In ordinary dealings, the creditor holds the evidence of his demand in his own hands, and, if he delays presenting it to the debtor, equity might infer that he was willing the matter should continue upon the footing already existing, and there would be a fair ground for denying him the right to charge interest. No such reason can apply to the case of seamen's wages, and the Court will be inclined, as a general rule, when the seamen are so situated that the master can offer them payment, to allow interest from the time the wages were due, until a tender or payment under the decree of the Court. This principle does not apply to wages decreed because of short allowance. That is in the nature of a penalty; or, put in its most favorable light, is an unliquidated claim, and one usually to be adjusted on contestation, when probably the Court may, in proper cases, make an augmentation of damages equivalent to interest. The

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ment, but of labor expended, partly on board and partly on shore, in discharging her cargo. This description of service has never yet been recognised as of a privileged order. It does not fall within the extensive list of debts privileged by the civil law ; nor does it seem to be comprehended within the principle upon which a lien or privilege is allowed.

A vessel is made chargeable with certain services, because they are necessary for her preservation or useful employment. Under this head is embraced the compensation of material men and others, for labor done upon the vessel, or in her navigation, or in promoting the health or comfort of the ship's company on a voyage. The language of the civil law has direct reference to this description of service ; and the French law, which gives a broader application to the privilege than has ever been yielded in England, does not extend it beyond those engaged in labors connected with the equipment or refitment of the vessel, either in respect to the vessel herself, or her necessary stores, her crew, &c., or in services performed on her during her voyage. The American law has never gone beyond the doctrines recognised in the continental Courts of Europe ; and it seems to me that it would be a departure from the well-understood terms of the maritime law in this respect, and from the principle which pervades its enactments, to give a lien upon the vessel to a claim of the character of the one now under consideration. It in no respect merits such privilege, any more than do the services of any other class of laborers in any work connected with the business of the ship. It does not seem to differ from a transportation of the cargo from one place to another on the land ; and the cartman who

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hauls off the lading and facilitates the discharge of the vessel, aids her in the same manner as the laborer who raises the cargo from her hold.

Independently of this objection to the maintenance of the present demand here, because of its character, there are other reasons why it cannot be enforced as a lien on the vessel. The testimony shows that it accrued under an explicit agreement with the master; and the whole nature of the contract shows that the personal responsibility of the master, or, at most, of the owner, was alone looked to. This would be sufficient of itself to exonerate the vessel, in a case where she might be chargeable in the absence of any personal credit. The mere circumstance that the price was fixed for which the services were to be rendered, will not free the vessel from a lien which would otherwise exist, because there is in this nothing inconsistent with the continuance of the lien, and nothing from which a waiver of it can be implied. But, when there is a clear unreserved agreement with the master individually, specifying the terms and mode of payment, the inference will be exceedingly forcible, that the personal responsibility alone was contemplated, and the creditor will be compelled to rely upon that. (*Hutton v. Bragg*, 7 Taunt. 14; *Ex parte Lewis*, 2 Gall. 483; *Murray v. Lazarus*, 1 Paine, 576.)

Upon both grounds, my judgment is against this action.

Libel dismissed, with costs.

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THE UTILITY.

In a case of supplies furnished in New-York to a vessel owned in North Carolina, where more than two years had elapsed, and no demand of payment had been made of the master who contracted the debt, or of those who owned the vessel when the debt was contracted, and the vessel had since made several voyages between New-York and North Carolina, and been sold at public auction to a *bona fide* purchaser without notice of the debt: *Held*, that the lien was lost.

When a claim becomes stale in the Admiralty, considered.

March 26th, 1831.

THIS was a libel *in rem* against the schooner Utility, for supplies of ship-chandlery furnished her by the libellant at New-York. The vessel was owned in North Carolina. The supplies were furnished between the months of May and November, 1828. Her then master was part owner of her at that time. She left New-York after receiving the supplies, with the knowledge of the libellant, and without any attempt on his part to detain her. After that, she made several voyages between North Carolina and New-York, but there was no proof that her being in the latter port was known to the libellant. On the 9th of February, 1829, she was sold, in North Carolina, to one Oliver. He having become insolvent, she was sold, on the 31st of May, 1830, by his assignees in that State, at public auction, and was purchased by the claimant, without notice of the libellant's claim. No demand of payment was ever made by the libellant of the master who contracted the debt, or of the then owners of the vessel. The libel was filed on the 7th of December, 1830.

Edwin Burr and Erastus C. Benedict, for the libellant.

John L. Mason, for the claimant.

BETTS, J.—The civil law gave a privilege, or right to priority of payment, to artificers and material men, for all debts created in the building or refitment of vessels. *Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel instruendæ causa, vel quoquo modo credideret, vel ob navem venditam petat, habet privilegium post fiscum.* (*Dig. lib. 42, tit. 5, § 34, ed. Gothof. p. 1,529.*) This privilege, which, in the Roman law, had the effect of a tacit mortgage, and took preference of express mortgages of a subsequent date, (*Domat, b. 3, tit. 1, sec. 5; Dig. lib. 20, tit. 2,*) is recognised in the maritime law of the present day, and is enforced by Courts of Admiralty, as it was in the civil law, by proceedings *in rem*. (3 *Kent's Comm.* 169 to 171; *Abbott on Shipp. ed. 1830, 109.*) I consider these authorities as abundant proof of the jurisdiction of this Court in respect to the subject matter of the present action, and shall therefore not enter now into a discussion of this doctrine as an open question.

— It would seem most reasonable, that a privilege of such efficacy, and which is not made manifest by any public act or registration, should not be suffered to lie latent, to the prejudice of third persons who acquire interests without notice of its existence. To allow claims of this character to rest dormant indefinitely, would hardly comport with the wholesome equity of the civil law which gave origin to them, or with the principles upon which they are sustained and effectuated by the Courts of modern times. The conveniences and facilities of commercial enterprise would not be promoted, but would be vexatiously incommoded

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by such a rule. Yet, no definite limitation to the time within which these privileges might be enforced, seems to have been declared by law. As they possessed the character of *quasi* mortgages, under the Roman law, they were undoubtedly enforced as mortgages. So long as the vessel remained in the port where her debts were contracted, she might well be considered as in pledge or pawn, and be immediately sold to satisfy the claim, upon the usual personal notice to the debtor. (1 *Browne's Civ. and Adm. Law*, 2d ed. 37.) The statute of this State seems to regard the lien given in respect to domestic vessels, in the nature of a pawn, for, if the creditor permits the vessel to leave the State, he is divested of his lien. (2 *Rev. Stat.* 493, § 2.)

Whether the tacit mortgage, when the thing bound remained in the hands of the creditor, was to be enforced by the action *serviana*, *hypotherariorum*, or *pignoratitium*, (*Dig. lib. 20, tit. 1, sec. 4*, and *tit. 5, secs. 6 and 7*), and judicial sale, (*Code, lib. 8, tit. 28, sec. 4*; *Dig. lib. 34, tit. 3, sec. 1*), in which other remedies might undoubtedly be had, as against the debtor, than merely subjecting the thing bound to a judicial sale or delivery to the creditor in satisfaction of his privilege, without regard to the time when the obligation was incurred or the action instituted, or whether the claim must have been set up and pursued whilst the subject of pledge remained *in visu*, does not appear to have been distinctly determined by the civil law. The modern law, in adopting the rule, seems to have left it with all its original uncertainty as to the time, if not the manner, of its enforcement. The statutes of limitation of the respective States are not understood to have any application to proceedings on

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the Instance side of the Court of Admiralty, (*Brown v. Jones*, 2 Gall. 477; *Willard v. Dorr*, 3 Mas. 91, 161,) and, accordingly, there would be no other limitation to prosecutions of this character than what is necessarily connected with the nature of the claim, or is implied by the Court in analogy to bars in similar cases at law.

Limitations to actions were known to the civil law, and did not vary essentially from those introduced into modern legislation, with this peculiarity as to one species—prescriptions—that, although a right by prescription might be acquired by three years' uninterrupted enjoyment of a thing, yet the action to try that right might be brought at any time within, in one case, twenty years, and in another, thirty years, after the claimant had lost possession. Though these limitations may have been applied to all cases resting in contract, and may, therefore, have embraced express mortgages, yet there appears to have been no provision in cases of tacit mortgages, either limiting the time within which the creditor might sell, or the mortgagor might satisfy the debt and repossess himself of the pledge. The general equity administered in the Prætorian Courts was competent to protect parties, in this respect, from any gross oppression. But this branch of their powers does not appear to have called for any fixed and precise edicts or system of rules. If relief in this behalf was sought, it was accorded upon the special facts presented in the particular case, and not in conformity to any general law. The only general restriction, adopted by the Courts of Chancery and Admiralty, upon the right to sue, where there is no statutory bar, is, that they will not take cognizance of *stale de-*

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mands. It is manifest that this limitation cannot have regard to lapse of time merely, because a demand may be delayed a long period, under circumstances affording a most equitable excuse, and will then be sustained, though it might be lost at law by the interposition of a positive bar. Neither would it comport with the interests of navigation, that these tacit liens should endure, as a general rule, until they might be termed in law, *stale*. Even in regard to seamen's wages, which are eminently first in the privileged class, the Courts exact the most satisfactory reasons for a protracted delay in bringing suit for them; (*Willard v. Dorr*, 3 *Mas.* 161;) otherwise, their lien upon the vessel is lost. (*Trump v. Ship Thomas*, *Bee's R.* 86.) All the cases seem to regard this privilege as one, the advantages of which may be relinquished or lost by the party; and the facts presented by the particular case are scrutinized with a view to ascertain whether they afford evidence of either the extinction or the waiver of the privilege. A reasonable ground of presumption is all that is required, and, in forming its conclusion, the Court will make every intendment against the continuance of the lien, which a jury ought to make on a trial before them. (*Willard v. Dorr*, 3 *Mas.* 91; *Stevens v. The Sandwich*, 1 *Peters' Adm. Dec.* 238, *note*; *Hall's Emeri.* 235, *note*; *Trump v. Ship Thomas*, *Bee's R.* 86.) The lien given by the statute law of this State is divested after twelve days from the vessel's leaving port, or on her departure upon a foreign voyage. (2 *Rev. Stat.* 492, 493.) And ordinarily, if a vessel subject to these silent liens, is suffered to leave the port where they are acquired, the presumption, in cases not governed by the statute, would be, that they

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had been waived. Artificers and material men would rarely consent to the departure of the vessel, unless satisfied with the responsibility of the owner, until other security was furnished them; and it would be a fair inference for a jury to draw, from the single fact of the vessel's being permitted to leave port, that other security had been substituted, or that the personal responsibility of the owner or master had been relied on. This, however, is not a conclusion of law, and the presumption may be rebutted by other circumstances. The more common, and, probably, the most satisfactory excusatory circumstances would be, that the master and owners were unknown to the creditor, and that the supplies were furnished with a view to fit the vessel for a return to her home port. I have always allowed the lien in such cases to pursue the vessel to her home port, or to a port of discharge or refitment, in case she was on a trading adventure; and, on evidence of due diligence to enforce it at either place, I should have no difficulty in sustaining the lien subsequently, whenever the vessel could be arrested. As, in this case, if it had been shown that the libellant's claim had followed the schooner to North Carolina, and that payment had been sought there without success, or that the vessel could not have been arrested until the time when the present warrant was obtained, I should not have considered the mere changes of situation of the vessel, or the lapse of time since the debt accrued, as a bar to its recovery in this mode. (See *The Mary*, 1 *Paine*, 180.) No explanatory proofs are offered; and, upon the bald case of a credit given in 1828, I should feel great repugnance to recognising it as a continuing lien on the vessel three years subsequently.

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There is another material particular in this case. The vessel has been twice sold, and is now in the hands of a *bona fide* purchaser without notice of this claim. The last purchase was at public auction, and two years after a portion of this debt had been contracted. I am not disposed to hold that a sale will, *per se*, necessarily divest the lien. No act of the owner, before a reasonable time has been allowed the creditor to set up his lien, should destroy its efficacy. His right should retain its force until impaired by laches of his own, or superseded by the legal or equitable rights of others. To permit an owner to free his vessel from incumbrances of this character, by transferring her to another person, might operate as a bounty to fraud and collusion. Nor would a purchaser, particularly at private sale, be ordinarily misled or wronged by the existence of tacit liens. He knows well the liabilities incident to the property, and proper precaution would, no doubt, be taken against them in the payment of the purchase money.

These considerations apply chiefly, however, to purchases made during the voyage of the vessel home, or immediately on her arrival, and under circumstances calculated to intercept the application of any lien which may be in a course of enforcement. The French law, which is also adopted in the civil code of Louisiana, permits a creditor, who has a privilege on a vessel, to pursue it while the vessel is in the possession of any person who obtained possession by virtue of a sale during her voyage; but, if the vessel was in port at the time of sale, and afterwards made a voyage in the name and at the risk of the purchaser, without any claim by the privileged creditor on the vendor, the

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privilege is lost and extinct against the ship. (*Code de Commerce*, liv. 2, tit. 1; *Civil Code of Louisiana*, arts. 3,206, 3,210.)

The proofs do not show distinctly whether this schooner has sailed in the name and at the risk of either one of her purchasers; but the presumption is, that she is now navigated in behalf of her actual owner, and, if the case turned upon this circumstance, the libellant would be required to prove the contrary, to avoid the application of the rule to him. Although we may not find the rule stated in the general maritime law with the minuteness and precision of the regulations of the French code, yet, it appears to me that those regulations rest upon a principle common to the maritime law wherever it is administered—that all liens upon vessels are temporary and evanescent, and can be continued no longer than until a reasonable opportunity has been afforded for their enforcement. This doctrine was clearly recognised by the Supreme Court of the United States, in *Blaine v. The Ship Charles Carter*, (4 *Cranch*, 332.) That was the case of a bottomry bond. The voyage had been performed, and an opportunity had been afforded for enforcing the bond. The ship subsequently made two voyages, and was then sold under executions in behalf of other creditors, and then the bottomry creditor attached her in Admiralty. The circumstances of the case were urged in argument to show that the bond had been satisfied in fact, but the Court relied upon none of those considerations. The case was decided upon the general doctrine, that the lien had the preference for the voyage on which the bottomry was founded. But, said the Court, "it certainly can extend no further." They considered the

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right of preference lost by the delay. The voyage need not necessarily be limited to the particular run to the home port, but would, in equity, be regarded as continuing until the vessel reached a place where the remedy might be enforced. A deviation to other ports, accidental or designed, and a close of the voyage at a port not contemplated by the parties or brought to the knowledge of the bond holder, would undoubtedly not be regarded as terminating the period allowed for the enforcement of the bond. There seems to be no sound reason for allowing a longer continuance to a tacit than to an express lien, and I am satisfied that the rule is both wholesome and equitable, which denies the continuance of the privilege beyond a period reasonably necessary for its prosecution and enforcement.

I shall accordingly order the libel in this case to be dismissed, with costs.

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Where a mate had on board his vessel a private adventure, consisting of provisions, which were used for the necessary support of himself and of the crew: *Held*, that he was entitled to recover, as enhanced wages, the value of the part consumed for his own support, and to be allowed, out of a surplus in Court, the value of the supplies beyond his own support.

In the disposition of the proceeds of a vessel, different claims are marshalled as follows: 1. Seamen, suing for wages; 2. Material men; 3. A consignee, for money advanced for towage, pilotage, light-money and port duties—each claim carrying with it its own costs.

Where parties appear in Court, not under compulsion, but voluntarily to protect their own rights, their claims for costs are entitled to only the same priority with their other claims.

April, 1831.

THE libel in this case was filed *in rem*, by material men, for necessaries furnished the brig Rodney. A

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stipulation was entered into by the several parties, that the vessel should be valued at \$1,350, and be discharged on the claimant's filing a bond to that amount, which was done accordingly. Afterwards, a petition was filed by other material men, and by the mate and seamen for wages. The mate included, under his charge for wages, the value of some hams on board belonging to him, which were consumed for the necessary support of the crew. The consignee of the vessel also claimed a lien upon her for light-money, pilotage, towage and port duties, advanced by him. The funds in Court not being adequate to the discharge of all the claims, a question arose as to the order of priority in their distribution.

BETTS, J.—As the proceeds of the vessel in this case are insufficient to meet all the claims, it becomes necessary to settle the priority of payment between the parties before the Court. The following parties claim satisfaction of their demands out of the fund: (1.) Seamen; (2.) The consignee, for port duties and charges, and other advances; (3.) Material men.

The item objected to in the mate's claim is for provisions furnished by him, amounting to fifteen dollars. The mate had a private adventure of hams on board, and, the crew being short of provisions, the master obtained those hams for the necessary support of the crew. In strictness, such a disposition of the provisions did not amount to the necessary finding by a seaman of his own subsistence; so as to partake of the character of extra wages. Had the mate been obliged to consume the hams for his own support, he might undoubtedly have been allowed their value in the na-

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ture of wages, upon the same principle that seamen recover, as wages, the cost of subsistence, when it is not furnished them by the vessel. (5 *Pothier*, 393, *Cont. de Louage des Mat.* § 4, *pl.* 215 ; *The Madonna d'Idra*, 1 *Dod.* 37.) So far as these provisions were necessarily applied to his own support, the mate may therefore recover for them as his subsistence, and thus as part of his wages. But, in strictness of law, for the residue, he would be obliged to come upon the proceeds in the character of a material man, or he might be substituted, in respect to the demand, in place of the master, and would then stand upon the same footing the master would, had he purchased the supplies from the mate, and would accordingly be postponed to creditors having a priority of lien. Nevertheless, as the extra charge is very trivial in amount, and the supply was of imminent necessity to the crew, I do not feel disposed to divide the demand, and shall allow the mate's charge for provisions to pass under the privilege of his wages, as if they had been consumed by himself. Had the claim been brought forward as the one under which the vessel was to be sold, and so as to affect essentially other liens, I might have distributed it into different orders of priority, giving that part furnished the crew no more than its strict legal privileges. The Court feels authorized to deal with remnants and surpluses, as against the ship-owner, upon an equity of a more enlarged character than it exercises in administering relief to parties prosecuting their rights by action. (*Gardner v. The Ship New-Jersey*, 1 *Pet. Adm. Dec.* 223.) All fixed, legal priorities will be observed in such cases, as a general rule. Still, the obligation to observe them will not be so controlling as not to leave

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it to the discretion of the Court to give precedence, in fit cases, to a demand which ordinarily would take a secondary or inferior place. This consideration is not to be overlooked, particularly when the ship-owner, the real debtor, is seeking of the Court the favor of taking the proceeds of his ship from the registry; and, as all the present suitors are appealing to the equity of the Court to transfer to them those funds, instead of permitting the owner to obtain them, it seems not unreasonable, in this particular, to deal with them as the owner himself would be dealt with. The mate, then, will be permitted to tack this small claim to his more considerable demand for wages, and have the same order of payment prevail as to both.

It is very manifest that the contestation between the parties is not founded upon the question of the privileged character of this portion of the mate's claim more than of the whole of it. The merits of the controversy relate to the order of priority which the respective demands may be entitled to claim. The claims before the Court are of four descriptions: (1.) Wages of seamen; (2.) Port charges and duties paid by the consignee; (3.) Work and materials performed and furnished by laborers and material men whilst the vessel lay at quarantine; (4.) The costs of the respective parties and of the officers of Court. The question is, in what order the proceeds in Court shall be marshalled to meet these various demands. It is to be observed, however, that, in disposing of the points, the Court does not assume the jurisdiction of a Court of Chancery, to compel parties to submit to a marshalling of assets, in the usual acceptation of that authority; but it inquires into and determines in what order, up-

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on the principles of the law maritime, these several demands would have been chargeable upon the vessel had the suits been against her, or upon the owner had the actions been *in personam*.

(1.) Seamen's wages take the highest place in the scale of privileges. Seamen are the most essential and the most meritorious of all who contribute to the support of navigation and trade. The well-established rules of the maritime law seem to give them a precedence over all other creditors. The French ordinance (*liv. 1, tit. 14, art. 16*) provides, that when the value of the ship shall not be sufficient to discharge all claims upon her, seamen's wages shall be preferred to all other charges. (See also *Valin's Commentary*.) This is changed by specific legislation in France. The code of commerce makes an arrangement of privileges which postpones that of seamen to many others not recognised by the general law maritime as entitled to priority. (*Code de Com. art. 191*.) Sir William Scott secured the preference to seamen over the holders of a bottomry bond, (*The Favorite*, 2 Rob. 232,) and, at a more recent day, re-affirmed the principle by a strong expression of opinion in favor of seamen. (*The Sydney Cove*, 2 Dod. 13.) The Supreme Court of the United States have, incidentally, given the same character to the claim for wages. (*Blaine v. The Charles Carter*, 4 Cranch, 332.) The fund will, accordingly, be applied to the satisfaction of the wages of the seamen and of their taxed costs, before the material men are paid.

(2.) The consignee, having paid light-money, towage, pilotage and port duties, claims a lien on the vessel for his reimbursement. These disbursements were manifestly indispensable to the entry of the ves-

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sel into port; and, if there be a well-founded doubt whether, upon the general principles of the maritime code, a superior privilege for their satisfaction can be maintained, it may have to be denied, unless it is recognised by regulations of positive law. The privilege is explicitly given by the French code, and is assigned, in order of priority, a rank above that of the wages of seamen. (*Code de Com. art. 191.*) The *privilegium* of the civil law, however, had respect only to credits given the vessel *per se*, or to those demands which, from their character, imported that the vessel was looked to for satisfaction, such as those which arose from services or materials furnished in her construction or refitment. (*Domat's Civil Law, book 3, tit. 1, sec. 5; Novell. 97, ch. 3; Dig. 20, 4, 5, 6; Dig. 42, 5, 26.*) Port duties are nowhere recognised in the English jurisprudence as one of those claims which the Admiralty will enforce, or which have any other existence than what may be given to them by the revenue laws. In *Ripley v. Gelston*, (9 *Johns.* 201,) the Supreme Court of this State incidentally allude to light-money and towage as claims having a lien on the vessel; but the point under consideration did not require that particular to be decided, and the expression was probably used rather to designate what was matter of rightful charge or claim, than to qualify its rank or efficiency. The revenue laws do not attach the demand specifically to the vessel. She is not admitted to entry, nor can her cargo be admitted or unladen in port, or the vessel depart, without the payment of port charges. (*Act of March 2d, 1799, 1 U. S. Stat. at Large, 627.*) And possibly the act, which thus raises an indebtedness or responsibility, might enable the

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United States to seek its satisfaction by process *in rem* against the vessel. Yet that would be merely an incident to the comprehensive remedies possessed by Government for the collection of its revenues, and would not necessarily go over to a third party who should discharge the demand.

There being no novation provided by statute, a Court of Admiralty would not supply it, unless the equities were of an exceedingly high and urgent character. The payment cannot be considered as made to save the vessel from forfeiture, and as entitled, on that account, to special distinction, or as imparting to the one making the payment the priorities possessed by the Government in respect to the demand. If a lien existed in favor of the United States, by virtue of the indebtedness, most clearly no forfeiture followed the failure to satisfy the lien. Forfeitures are never implied. They are, in relation to the revenue laws, creatures of statute. All that the vessel could have been subjected to, if the consignee had not interposed, would have been an action for the recovery of those dues and of the costs of such action. Had there, however, been a forfeiture, the claims of the seamen for wages would have taken priority over the rights of the United States accruing under such forfeiture. (*The St. Jago de Cuba*, 9 *Wheat.* 409.) The remedy of pilots and wharfingers would be no greater than that of the United States, and, accordingly, if the consignee, by satisfying those dues, was entitled to the privileges of the original creditors, their demands would not overreach the claims of seamen. The claims of all parties, therefore, to priority over the seamen, are disallowed.

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(3.) The accounts of the petitioners who furnished necessary supplies and labor to the vessel at quarantine, are entitled to be paid previous to the claim of the consignee for duties paid on the cargo. Had the Government sought satisfaction of duties out of the fund in Court, its demand must have been paid in preference to the claims of the material men. The duties had accrued and become payable before the debts to the material men were incurred. The Government, therefore, stood first in equity, independent of the consideration of its prerogative rights. It is not necessary to inquire what would have been the rule had the liens of the material men existed when the vessel came into port. Their credits were given to the vessel after she had become chargeable with duties, and, as against the Government, they could not equitably ask to have that liability postponed on their account, as their services were not necessary to put the vessel in a situation to create and incur those duties. She had completed her voyage when their debts were incurred. But the consignee of the ship only cannot possess himself of the advantage of the Government priority. No act of Congress transfers that privilege to a party who receives the ship or cargo, and discharges the duties. Such payment by him would be esteemed voluntary, or to have been made out of funds of the consignor. In this instance, the consignee has not the equity of a consignee or shipper of goods who could not land the cargo without satisfying the duties. In such a case, the cargo might be perishable, and he might be compelled to make the advance immediately. Here the vessel was in ballast, and the consignee could pay, or omit to pay, at his option. Although the Court

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might refuse to pay over the fund to the owner, before this demand was satisfied, yet the consignee is not entitled to any priority over other creditors in its distribution here.

(4.) It is contended, that all necessary parties who have been brought into Court by force of the proceedings here, are entitled to their costs out of the fund. The intervention of all the parties has been voluntary. No one has been coerced to appear. It is, therefore, unnecessary to inquire what remedy the Court would afford a party who had been wrongfully compelled to appear and answer. Where no attachment against the person is sued out by the promovent in an Admiralty cause, it is wholly optional with parties whether they intervene or not. If they make themselves parties, it is to protect or enforce some right of their own in the subject matter of the suit. Their relief in regard to costs, then, ought to be only commensurate with and dependent upon their relief in regard to the subject of contestation. That rule will accordingly be now observed. The seamen will recover their wages and costs in full, the material men their demands and costs out of the residue, and the balance, if any, may be paid over to the consignee.

Let the clerk report the amount due to the respective parties, and tax the costs, and, on the confirmation of his report, let payment be made in conformity to these principles.

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Courts of Admiralty in the United States have jurisdiction over claims for salvage upon waters within the ebb and flow of the tide, though within the body of a State.

A pilot is under no legal obligation to take charge of a vessel in distress, unless her condition be such as to require pilotage services.

Courts of Admiralty have jurisdiction of suits for pilotage.

If a pilot goes beyond the duty imposed upon him by law, and renders meritorious services to a vessel in distress, he becomes a salvor, and may sue in Admiralty for salvage, though the service be performed upon pilotage ground.

April, 1831.

THIS was a libel for salvage, filed by the owners and crew of the pilot-boat *Gazette*, against the schooner *Wave*. The facts were these: The *Wave* left her moorings at the wharf in New-York on the 2d of February, 1831, with intent to go to sea. A pilot, (one of the libellants,) had been on board of her after she was ready for sea; but, as she was locked in by ice, and there appeared to be no chance of her getting out soon, he left her, with an understanding that he would return when he was wanted. A signal was afterwards hoisted by the *Wave* for a pilot, but, a sudden opening of the ice around her occurring, she put out without waiting for a pilot, keeping the signal up. The signal was soon hauled down, the master thinking his mate a competent pilot in the harbor. Near Bedlow's Island, a pilot-boat was spoken coming up, and an inquiry was made, from on board the *Wave*, about the ice below. No pilot was asked for. In the lower bay, the *Wave* was found to have sprung a leak, and to be making water rapidly. The master ordered a signal for a pilot

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to be made. Immediately afterwards it was run down, and a signal of distress was hoisted. Guns were also fired. The schooner was then brought to anchor in three and a half fathoms of water, about a mile from Sandy Hook beach. She was fast filling. The crew were exhausted by their exertions, two of them were spitting blood, and, in despair of being able to keep the schooner afloat much longer, they had brought their baggage on deck, and loosened the boat, with a view of making their escape. The pilot-boat of the libellants, when the signal of distress was first observed, was outside the Hook, from three to five miles from the Wave. She immediately made efforts to reach the Wave, but, the tide being ebb, and the wind being strong ahead, she could not reach her under about an hour and a half. When within hail, the inquiry was made from the pilot-boat, as to what was wanted. The master of the Wave said, that his vessel was sinking, and he wanted assistance. Hyer, one of the libellants, boarded her, and, ascertaining her situation, sent back his small boat for more men, and soon after ordered the pilot-boat to be brought alongside of her. Hyer was a branch pilot. He had on board the Gazette, with him, two deputy pilots, three apprentices and a cook. When he went on board the schooner, the master surrendered possession of her to him. The testimony as to the expressions used was not clear or entirely consistent. Some of the witnesses understood that the schooner was delivered up to him absolutely, and others that she was surrendered to him as pilot. The facts, however, were, that Hyer immediately assumed the entire command on board the schooner. He ordered her hatches to be broken open, shifted the

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cargo aft to raise her bows, placed a strong relief at the pumps, sent hands forward in a small boat to check the leak by securing a tarpaulin and a board over it, unloaded part of the cargo of the Wave, and loaded the pilot-boat with it, and, when the schooner was so far lightened and freed from water as to be navigable, towed the Wave, by the Gazette, to Prince's Bay, where she was anchored and repaired. She was afterwards taken to New-York by his orders exclusively, and it appeared that in taking her to Prince's Bay, and during the time she was anchored there, and in bringing her afterwards to New-York, her master did not exercise any authority or claim any command. After the Wave was taken to New-York, upon a refusal by her owners to make such compensation for their services as the libellants demanded, they brought the present action. The other facts necessary to the understanding of the case are contained in the opinion of the Court.

Aaron Burr, for the libellants.

Robert Sedgwick, for the claimant.

BERTS, J.—The first objection to the recovery of the libellants rests upon the proposition, that the Courts of Admiralty of the United States cannot take jurisdiction over civil causes of a maritime character arising within the territorial limits of a State. It will be unimportant, in considering this proposition, to inquire whether the cause of action in this case arose within the limits of this State, or those of New-Jersey; for, if the objection is valid, it excludes the jurisdiction of this Court in either event. Assuming that the services rendered by

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the libellants would, if rendered on the high seas, have entitled them to salvage, the point is narrowed to the single inquiry, whether the jurisdiction of the Court over a subject matter properly belonging to it, is destroyed because the cause of action arose upon waters within the boundaries of a State. The question is one of great magnitude; for, if the doctrine of the claimant's counsel is correct, Courts of Admiralty have no jurisdiction within the bays, harbors and inlets with which our vast range of coast is indented, other than what is expressly given by statute in revenue and criminal cases, and all civil causes of a maritime character, which have their origin in those places, fall exclusively under the jurisdiction of the States within whose territorial limits those waters flow.

The argument is founded upon general principles alone. No decision of any State Court, claiming such jurisdiction, is referred to, nor am I aware of any decision of any Court in this country which supports the doctrine. There is, unquestionably, a great contrariety of opinion in our Courts regarding the character and extent of the Admiralty jurisdiction. But that difference has respect to the subject matter over which the jurisdiction may be exercised, rather than to the place where the question arises, and will, therefore, be more appropriately considered hereafter.

Although, generally, the question of the jurisdiction of Courts of Admiralty is determined by the subject matter of the controversy, (*Menetone v. Gibbons*, 3 T. R. 267,) yet, in many instances, the *locus in quo* is a most material particular. (*The General Smith*, 4 Wheat. 438.) As, if an act be performed on the high seas, the place may, of itself, confer jurisdiction. But it is

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contended, upon the doctrines of the Courts of common law in England, that the Admiralty jurisdiction is limited to matters occurring upon the high seas. Without tracing minutely the rise and extent of that doctrine in England, it is sufficient, on this branch of the case, to observe, that it has always been a contested point between the Court of Admiralty and the Courts of law, (*Zouch*, 1 to 51, 122; 1 *Sir Leo. Jenkins*, 76; 6 *Hall's Law Jour.* 568; *The Apollo*, 1 *Hagg.* 306, 312; 4 *Inst.* 134; *Prynne's Animad.* 75, *et seq.*) and that, in the end, the common law judges have conceded that Admiralty may have a concurrent jurisdiction as to place, in bays, harbors, &c., within the ebb and flow of the tide, where ships of war float. (*Bruce's Case*, 2 *Leach's C. C.* 1,093.) Besides, whether the rule has limits or not in England, our Courts regard the decisions of the English common law Courts in respect to the jurisdiction of the Admiralty as of little or no authority. (*De Lovio v. Boit*, 2 *Gall.* 398; *The Jerusalem*, *Id.* 345.) And this particular point appears to be put at rest by decisions of the highest character and authority in this country, which recognise a like jurisdiction of the Admiralty in bays, harbors, &c., where the tide ebbs and flows, and on the high seas. The High Court of Appeals in Pennsylvania, previous to the adoption of the Constitution, recognised the Admiralty jurisdiction as embracing the waters of the Delaware opposite the city of Philadelphia. (*Montgomery v. Henry*, 1 *Dall.* 49.) Judge Bee took cognizance of a salvage case in Charleston harbor, respecting goods cast on shore, notwithstanding there was a State law in force in regard to wrecks, which applied to the case. (*Stevens v. The Argus*, *Bee's R.* 170.)

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The Supreme Court sustained a libel for salvage on the Delaware bay near the town of Lewes. (*Peisch v. Ware*, 4 *Cranch*, 347.) The Admiralty takes jurisdiction, also, of claims for seamen's wages, when a part of the service is on tide waters. (*The Thomas Jefferson*, 10 *Wheat*. 428.) In all cases of tort and revenue falling within the cognizance of Admiralty, tide waters have been considered, equally with the high seas, as places where that jurisdiction could be exercised. It was decided by the Supreme Court, soon after its organization, that violations of the revenue laws in the waters of our bays, harbors, &c., were, in their nature, cases of Admiralty jurisdiction. (*La Vengeance*, 3 *Dall*. 297.) That Court has been invoked, on various occasions, to review that decision, but it has always been sustained to the fullest extent. (*The United States v. The Sally*, 2 *Cranch*, 406; *The United States v. The Betsey*, 4 *Id.* 443; *Whelan v. The United States*, 7 *Id.* 112; *The Octavia*, 1 *Wheat*. 20; *The Sarah*, 8 *Id.* 391.) The cause of prosecution in the case of *La Vengeance* occurred at about the same place where the Wave anchored, within the waters of Sandy Hook. Judge Story investigated the subject at an early period in his judicial career, with great sagacity and depth of research, and demonstrated the legitimate jurisdiction of the Admiralty over waters within the ebb and flow of the tide. (*De Lovio v. Boit*, 2 *Gall.* 398.) And, after a lapse of fifteen years, that learned judge avowed his adherence, in substance, to the doctrines he had before laid down. (*The Tilton*, 5 *Mas.* 465.) The circumstance relied upon, that the cause of action in the present case arose within the limits of a State, would, therefore, not exclude the jurisdiction of this Court

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over the subject. The Supreme Court has decided, that the cession of cases of Admiralty and maritime jurisdiction by the Constitution is no cession of the waters upon which those cases may arise. The waters themselves remain the territory of the State within which they lie. (*The United States v. Bevens*, 3 *Wheat.* 388.) Whatever relation, therefore, this jurisdiction may have to locality, it does not require, to support it, that the sovereignty over the place should be in the United States, or out of a particular State. It is, in this respect, of the same character as the jurisdiction conferred upon the Federal judiciary, over "all cases affecting ambassadors, other public ministers and consuls," which must be exercised without regard to territorial limits or jurisdiction. It seems to me, also, that suits in Admiralty by material men come within the same principle. The cause of action in such cases always arises within the territory of a State; yet, the Admiralty has unquestionable cognizance of them upon tide waters. (*The Jerusalem*, 2 *Gall.* 345; *The General Smith*, 4 *Wheat.* 438.) And even with respect to actions by seamen for wages, between joint owners for the possession and management of vessels, and upon hypothecations, the entire cause of action may have its origin and termination within a State. So far as place is taken into contemplation in determining whether Admiralty can have cognizance of causes of civil and maritime jurisdiction, the single consideration seems to be, whether they have relation to transactions on sea or tide waters. (*The Thomas Jefferson*, 10 *Wheat.* 428.)

The second objection to the jurisdiction of the Court has reference to the capacity of the parties. It is

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denied that pilots can maintain suits here for any services they may render. This objection embraces two propositions: (1.) That pilots cannot be salvors; (2.) That a Court of Admiralty cannot take cognizance of claims by pilots for even the pilotage compensations allowed them by law.

(1.) The first branch of this objection must undoubtedly be intended to be limited to situations where the pilot might be required to perform the duties of his office, and not to apply whenever he might chance to navigate the high seas. The libellants, or some of them, were appointed to pilot vessels from New-York to sea, and from sea to New-York, by the way of Sandy Hook. It will, therefore, probably not be denied, that if they had rendered services on board a vessel off Charleston harbor, or at any place remote from Sandy Hook, they might, notwithstanding their commission as pilots, claim as salvors in that behalf. The objection is understood to be, that pilots cannot be salvors in places where they may be bound to act as pilots. No case has been cited in which this specific doctrine is advanced. But it is deduced from the assumption that the libellants, as public officers, were bound, *ex officio*, to perform the services rendered in this case. I shall hereafter advert more particularly to this position, in considering what duties were imposed on them *virtute officii*; and, unless the disqualification set up against them is found to result from the character and obligations of their appointment, there would seem to be no foundation for it in law or principle. The principles of the maritime law would certainly apply no more strongly in excluding pilots from becoming salvors, than it would to the ship's company of the vessel saved,

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it being their duty to render all practicable aid to the vessel to which they belong. And yet, at this day, it is incontrovertibly settled, that seamen may be rewarded as salvors, for services in the preservation of their own ship. (*The Blaireau*, 2 *Cranch*, 269; *The Two Catharines*, 2 *Mas*. 319.) So, also, the men of a king's ship, whose specific duty it is to protect and succor merchant vessels, are entitled to recover salvage for extraordinary exertions in saving a vessel or cargo. (*The Mary Ann*, 1 *Hagg*. 158.)

Not only has the counsel for the claimant failed to produce any direct authority in support of the doctrine for which he contends, but it does not appear that the objection has ever been raised in the English Court of Admiralty; or, if it has been, the principles upon which that Court proceed have completely discountenanced and overruled it. (*Godolphin*, 45 to 50, 166, 183; *Zouch*, 50.) In the case of *The Joseph Harvey*, (1 *Rob*. 306,) before Sir William Scott, in April, 1799, the judge observes: "It is allowed the Court may, in cases of pilotage, as well as of salvage, direct a proper remuneration to be made. It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called; for it is possible that the safe conduct of a ship into a port, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service." In that case, pilots claimed salvage. They boarded a vessel off Dover Castle, which had a signal up for a pilot, and wished to go into the Downs. When spoken, the answer was, that the vessel wanted a pilot; and, there being strong proof of misconduct on the part of the pilot, and the testimony given by him, as to the

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distress of the vessel, being contradicted, the Court refused him any compensation. The question, however, was directly before the Court, whether salvage could be claimed by a pilot under such circumstances, and no doubt seems to have been entertained that it could be. Another case is cited by the reporter, in which, there being no misconduct of the pilots, a liberal salvage was awarded by the Court. It was the case of a salvage service on the coast by a pilot-boat which went out to the assistance of a vessel in distress. The Court awarded salvage, with strong language in support of the claim. "It is expedient," the judge remarks, "for the security of navigation, that persons of this description, ready on the water, and fearless of danger, should be encouraged to go out for the assistance of vessels in distress." (*The Sarah*, 1 Rob. 316, note.)

So, also, the Courts in this country have recognised the same doctrine. In the case of *Dulany v. The Sloop Peragio*, (*Bee's R.* 212,) in the District Court of South Carolina, the libellant claimed salvage. He was a pilot, and boarded the vessel while she was at anchor at Bull's Inlet. She had been injured in a storm, and had lost her masts, &c., but the crew had rigged a jury-mast, and the vessel was tight and sufficiently provisioned. The libellant towed her into Charleston harbor. Judge Bee decided that it was not a case for salvage, but that the pilot should be allowed \$200 above his pilotage, and the costs of suit. No doubt was suggested of the authority of the Court to give salvage to a pilot. The case of *Hand and others v. The Schooner Elvira and cargo*, decided by Judge Hopkinson in the Pennsylvania

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District, in April, 1829,¹ upon facts extremely like those in the case last cited, except that the vessel was not found at anchor, was also a claim for salvage by pilots. The libellants, when they boarded the vessel, were cruising in their vocation on board their pilot-boat; and the question was raised and discussed by counsel, whether the pilots could be salvors in the case. The judge declared that he had no difficulty upon this point, and adopted the sentiment of Sir William Scott—that circumstances may occur exalting a pilotage into a salvage service—and allowed salvage in the cause. The District Court of South Carolina takes cognizance of claims by pilots for salvage. Salvage has been recently allowed by that Court for piloting a vessel out of Charleston harbor, without any question as to the jurisdiction of the Court. (*The Owners of the Pilot-Boat Washington v. The Ship Saluda*, April, 1831.) I am, therefore, satisfied that, by the maritime law, pilots may be remunerated as salvors, even in cases where they may be, at the same time, acting in the capacity of pilots. Whether the statute has prescribed a different rule with respect to the pilots of this port, will be more particularly considered hereafter.

(2.) If this Court can justly entertain jurisdiction of this cause, it would be authorized, upon the pleadings before it, if the service is proved to be only a pilotage service, to award the libellants a compensation as pilots, should it decide that they could recover nothing more. The general objection, therefore, raises the question, whether pilots can sue for and recover pilotage fees in a Court of Admiralty.

¹ This case has since been published in 1 *Gilp. R.*, 60.

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Inquiries into the legitimate jurisdiction of Courts of Admiralty are amongst the most perplexed questions of our jurisprudence. No standard is established by which this *questio vexata* can be determined with exactness. By the Constitution, the power of the Federal judiciary extends to all cases of Admiralty and maritime jurisdiction; and, by the act of Congress of September 24th, 1789, (1 *U. S. Stat. at Large*, 73, 77,) the District Courts have exclusive original jurisdiction of all civil causes of Admiralty and maritime jurisdiction. But neither the Constitution nor the statute defines what that jurisdiction comprehends, nor do they indicate the sources from which principles may be drawn limiting or explaining it. A subsequent act, passed May 8th, 1792, (1 *U. S. Stat. at Large*, 275, 276,) provides, that the forms and modes of proceeding in suits of Admiralty and maritime jurisdiction shall be according to the principles, rules and usages which belong to Courts of Admiralty as contra-distinguished from Courts of common law. This act has been construed not to have reference to all Courts of Admiralty, but to those of England and this country alone, (*Manro v. Almeida*, 10 *Wheat.* 490,) and, although the same case interprets the act to have relation to the practice of the Court only, and not to its jurisdiction, yet a strong implication would arise that Congress contemplated that a Court of Admiralty in this country derived the principles regulating its jurisdiction, and those which were to govern its practice, from one and the same source. If it be admitted, however, that we are to regard the jurisdiction of the Admiralty in England as that which is to determine the character and extent of the jurisdiction of our Courts, yet a great

difficulty still remains, to ascertain what period in the history of that jurisdiction we are to select, and whether we are to model our judicature, in this behalf, in conformity to the ancient functions of the English Admiralty, or limit it to the powers which that Court exercised at the Revolution. Nor can the authority which that Court exercised at any given period of its existence be now defined with certainty. The evidences of its jurisdiction are far from being clear or satisfactory. By the civilians, an almost unlimited extent was claimed for it, whilst the common law lawyers generally considered its legitimate authority as very restricted and unimportant. The history of the foundation of the Court is no longer extant. The reasons and purposes which led to its establishment are to be implied only from the objects the Court was found to subserve. The theory of British polity supposes the monarch to be the fountain of all judicial authority. In the earlier ages of the Government, and, indeed, after the Constitution had attained to some degree of symmetry, the judicial power was either exercised in person by the king, or was conferred by him at discretion upon such tribunals as he might designate. The Court of the Admiral (with those of the marshal and constable) was undoubtedly called into being as an instrument by which the royal prerogative, in relation to matters *dehors* the kingdom, could be most conveniently exercised. The Admiralty Court was probably instituted with limitations and restrictions now lost to juridical history. But it would soon be discerned that the Court was adapted, by the celerity of its action and its ready subserviency to the will of the monarch, to enlarge and strengthen his powers; and

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that consideration would lead him, from time to time, to encourage its cognizance of subjects of a purely municipal character. The readiness of the Lord High Admiral, or of his Surrogate, to amplify his jurisdiction, would also conduce to draw under his cognizance matters occurring within the kingdom, whether wholly territorial, or mingling with transactions on the high seas and abroad appertaining appropriately to the tribunal. How long and to what extent this domestic and municipal jurisdiction of the Admiralty was exercised, cannot now be ascertained; but there is abundant evidence that it was exceedingly comprehensive and diversified. (*Zouch*, 14, 50; *Godolphin*, *passim*.) Almost the earliest notice furnished by history of the existence of the Court consists in details of the strenuous efforts made to subdue and bound its authority in relation to matters of an internal and municipal character. The acts of 13 and 15 Richard II. were passed for that purpose, the one directing that the admiral shall only meddle with things done upon the sea, and the other, that he shall not take cognizance of contracts, pleas and quarrels, and other things arising within the bodies of counties, nor of wrecks. But, although these statutes designate certain matters with which the admiral shall not meddle, neither of them assumes to define the legitimate objects and limits of his jurisdiction. An active controversy subsisted for ages afterwards between the Courts of common law and the Admiralty Court, upon the claims of jurisdiction. The king was appealed to, as the fountain and arbiter of the powers of all the Courts. He commanded a mutual adjustment of the disputed point by the respective judges; but, although the arrangement was solemnly consummated on paper, it

was never observed, and the common law Courts proceeded, by gradual advances, until they nearly extinguished all procedures in the Admiralty. Except as a Prize Court, it now exercises, in fact, in England, but a meagre and stinted authority, compared with the powers it once wielded. Yet it is believed that, to this day, the Admiralty Court does not accede to the justness of the restrictions imposed upon its jurisdiction. (*The Hercules*, 2 *Dod.* 371; *The Apollo*, 1 *Hagg.* 312.) Let it, therefore, be established, that we are to resort to the English Admiralty for the principles and usages which shall govern the proceedings of our own Courts of that denomination, and it is manifest that difficulties of serious magnitude lie in the way of any practical and available use of the criterion. It still remains to be settled, to what period or era of the Court we shall direct our attention; and how we shall ascertain what authority then properly appertained to the Court.

The learning in relation to the history of the English Admiralty, its just jurisdiction, the claims of the common law Courts in contravention of it, and the principles upon which the Admiralty and maritime jurisdiction conferred by the Constitution of the United States should be exercised, are collected and systematized in various authorities, a general reference to which will be sufficient to bring into view the doctrines which have prevailed on these topics. (*Introduction to Hall's Admiralty Practice*; *Introduction to Sergeant's Constitutional Law*, 2d ed.; *Duponceau on Jurisdiction*, Appendix; *De Lovio v. Boit*, 2 *Gall.* 398; 1 *Kent's Comm.* 353; *United States v. Wiltberger*, 5 *Wheat.* 106, n.; *Ramsay v. Allegre*, 12 *Wheat.* 614, *Opinion of Johnson, J.*, and note; *The Schooner Tilton*, 5 *Mas.*

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467; 6 *Dane's Abr.* 355; *Zouch*, 14; *Godolphin*, ch. 4; *Exton on Adm. Jurisd. passim*; 4 *Inst.* 134; 12 *Co. R.* 79; 1 *Beaues' Lex. Merc. by Chitty*, 400; *Prynne's Animad.* 75.) The general position which the Courts of this country seem disposed to maintain is, that Admiralty will take cognizance of subjects of controversy of a maritime character. (*The Jerusalem*, 2 *Gall.* 345.)

The piloting a vessel to and from sea would seem to be peculiarly a service of a maritime character. I do not find that the right to recover compensation for such a service, by a suit in Admiralty, has ever before been called in question; or that the manner in which the pilot was commissioned, or whether or not the local law supplied him a more convenient remedy, has been allowed to affect his right to resort to this Court. No doubt seems ever to have been suggested by the Court or the bar in England, that pilots might recover their fees in Admiralty, except for services on navigable rivers, (*The Eleanor*, 6 *Rob.* 39; *Abbott on Shipp. ed.* 1829, pt. 2, ch. 5,) although such suits are common, (*The Joseph Harvey*, 1 *Rob.* 306; *The Benjamin Franklin*, 6 *Id.* 350; *The Nelson*, *Id.* 227,) and notwithstanding a summary remedy, by attachment of the vessel, is furnished them by statute. So, like suits have been sustained in our own Courts. (*The Anne*, 1 *Mas.* 508; *Le Tigre*, 3 *Wash. C. C. R.* 567.) Judge Story remarks, in the case of *The Anne*, that Admiralty has, upon principle, a rightful jurisdiction, as well *in personam* as *in rem*, over claims for pilotage for services performed on, from or to the sea; and he expresses his extreme doubt of the correctness of the decisions of the English common law Courts, that no suit lay in Admiralty, in favor of a pilot, for services on a navigable

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river within the body of a county. And it is to be remarked, that neither did the statute of Massachusetts, nor does the existing one of this State, prescribe the manner of recovering the compensation of pilots, or furnish any extraordinary facilities in their behalf. It would seem, therefore, to result, that though commissioned under a State law, the pilot may have recourse to any remedy adapted to the nature of his right, and I shall unhesitatingly hold that this action is maintainable in Admiralty, whether the libellants claim compensation as salvors, or for pilotage fees. The mode in which the amount of such fees is to be assessed or ascertained, may be determined by the local law, without affecting the remedy in this Court. The action of the Court in regard to matters clearly within its jurisdiction by the general principles of the maritime code, may be limited to the enforcement of the existing municipal law. (*The Robert Fulton*, 1 *Paine*, 620.)

It is not necessary now to inquire whether the State Courts have concurrent jurisdiction with the Admiralty for the recovery of pilotage fees, inasmuch as no exclusive or specific remedy is prescribed by the State act. Yet, if the case is, in its nature, one of Admiralty and maritime jurisdiction, there is great weight of authority for the conclusion, that the jurisdiction of this Court is exclusive of that of State tribunals, whether conferred upon them by the laws of the State or by acts of Congress. (*Martin v. Hunter's Lessee*, 1 *Wheat.* 337; *The American Ins. Co. v. Canter*, 1 *Peters*, 511, 546; 1 *Kent's Comm.* 377; *Sergeant's Constitutional Law*, ch. 21; *Cohens v. Virginia*, 6 *Wheat.* 397; *Houston v. Moore*, 5 *Id.* 27, *Opinions of Johnson and Story, JJ.*; *Duponceau on Jurisdiction*, 90; *Rawle on the Consti-*

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tution, 191.) In *The American Ins. Co. v. Canter*, (1 *Peters*, 511, 546,) which was a case of somewhat kindred features to the present one, Chief Justice Marshall says, that "Admiralty jurisdiction can be exercised in the States, in those Courts only which are established in pursuance of the third article of the Constitution." This would deny to Congress the power of authorizing any State tribunal, as such, to take cognizance of cases of Admiralty jurisdiction; much more would it militate against the right of any State to exercise such power, of its own authority. Nor does this doctrine infringe upon that laid down in various decisions, particularly with respect to criminal offences, that there may be a capacity in the United States' judiciary, by the terms of the Constitution, to exercise a jurisdiction which must, nevertheless, lie dormant because Congress has not designated the offence, or the manner in which the Court shall act upon it; (*The United States v. Bevens*, 3 *Wheat.* 336; *The United States v. Wiltberger*, 5 *Id.* 76;) because the aid of an authorization by Congress is not deemed necessary to perfect the jurisdiction of the Court in civil causes of Admiralty and maritime jurisdiction. (*Jennings v. Carson*, 4 *Cranch*, 2.)

The third and last general objection to this action is, that by the laws of the State of New-York, under which the libellants were commissioned, they were bound to render the services performed by them, and can only be compensated therefor conformably to the provisions of the State law. This objection rests upon two propositions—that a public officer is bound to perform all the duties of his office, for the compensation appointed by law for such services, and can claim

nothing beyond such stated compensation ; and that, the mode in which his compensation is to be ascertained being fixed by law, he can avail himself of no other mode of determining the amount.

The first position is well founded in reason, and is, no doubt, sustained by the general principles of law. It has been applied by an eminent judge in denying salvage in a case where an individual derived extraordinary benefit from the services of a public officer. The officer, being in the execution of the duties of his office, happened to render meritorious service to property in peril, and afterwards libelled it for salvage. Judge Washington decided, that he could not sustain the claim. (*Le Tigre*, 3 *Wash. C. C. R.* 567.) The language of the Court would, however, seem to imply, that if the direct object of the officer had been to preserve the property, he might have been entitled to salvage for such special service, notwithstanding his official authority over, or connection with, the subject.

In order to apply this rule of law to the case before the Court, it is necessary to ascertain with precision the nature and extent of the duties imposed upon the libellants by their offices of pilots, and how far they are to be regarded as acting, in this behalf, as public officers. Pilots, in maritime law, are persons taken on board at a particular place, for the purpose of conducting a ship through a river, road or channel, or from or into port. (*Abbott on Shipp.* ed. 1829, 148; *Jacobsen's Sea Laws*, 125, 127.) In this capacity, they have the entire command of the vessel in her navigation whilst she is under weigh, and in selecting the place and determining the manner of bringing her to anchor. But the pilot is subordinate to the master in all other respects.

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The latter has the control of the vessel and crew, and is to be obeyed as to the destination and disposal of her, and the time of making sail and coming to. (*Abbott on Shipp. ed. 1829, 226.*) The authority of the pilot being limited, then, by the law maritime, to the navigation of the vessel, his duties and responsibilities as pilot would, accordingly, be bounded by the same limitations. If any further duty was imposed upon the libellants in the present case, it must have been by some provision of positive law. This will lead us into an inquiry as to the situation in which this subject has been placed by statute.

From the year 1731, a statute has been in force in this State in relation to the pilots of this port. The Colonial law was re-enacted by the State Legislature, after its independency, and has continued, in substance, the same to the present day. Slight variations have occasionally been introduced as the acts passed under review, but nothing essentially changing the general features of the system. (1 *Liv. and Smith's ed. Laws of New-York*, 200, 5 *Geo. II. ch. 565*; 2 *Van Schaack's ed. Laws of New-York*, 433, 4 *Geo. III. ch. 1,214*; 1 *Jones and Varick's ed. Laws of New-York*, 120; 6 *Webster and Skinner's ed. Laws of New-York*, 277.) So, also, the other maritime States had, previous to the Federal Constitution, adopted provisions regulating pilots within their respective territorial jurisdictions. The main purport of the various acts was to provide for the appointment of competent pilots, to declare the manner in which their services should be performed, and to fix their compensation, and, in some instances, the mode of its recovery. To obviate all questions as to the effect of the State laws after the United States

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Government went into operation, Congress, at its first session, passed the act of August 7th, 1789, (1 *U. S. Stat. at Large*, 53, 54,) by which it was enacted, "that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." The power of Congress to adopt, in this manner, the prospective legislation of the States, need not be questioned in the present case, because, the State statutes then and now in force being essentially the same, it is unimportant which is regarded as the rule of decision. The State act of February 19th, 1819, (*Sess. Laws*, 1819, *p.* 11,) would, according to the terms of the act of Congress, be the one now in force. At all events, it is the one set up by the claimants as prescribing the duties pilots are to perform *virtute officii*, and as debarring these libellants from all other recompense than that given by the statute. The general duties of this class of pilots, so far as they are defined by that statute, are, to pilot vessels from New-York to sea, and from sea to New-York, by the way of Sandy Hook; to keep and maintain in the piloting service to and from the port of New-York by the way of Sandy Hook, not less than five good and sufficient pilot-boats; and to exhibit their printed instructions to masters of vessels when they board them, and govern themselves by those instructions. The 9th section of the act empowers the board of wardens to adopt such rules as it may deem proper for the government of pilots, and to revoke or amend them

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at discretion. A body of rules, adopted by the wardens on the 16th of April, 1819, was offered in evidence; but, as they were revoked by subsequent rules adopted on the 19th of June, 1819, they cannot be regarded as applicable to this case, further than as they may aid in the interpretation of those now in force. The fourth rule of June, 1819, provides, that "vessels that approach the coast in distress shall have the preference of others, and pilots are required to go on board such a vessel appearing in distress and in want of a pilot, in the first instance, and render her every service or assistance in their power." The 19th section of the statute enacts, "that the master, owner or consignee of any ship or vessel appearing in distress and in want of a pilot on the coast, shall pay unto such branch pilot, or deputy pilot, who shall have exerted himself for the preservation of such ship or vessel, such sum for extra services as the said master, owner or consignee and pilot can agree upon; and, in case no such agreement can be made, the board of wardens shall determine what is a reasonable reward, and the sum so determined by them shall be paid in manner aforesaid." It would seem very manifest that the Legislature, in the provisions of the above section, and the wardens, in the rule promulgated by them, contemplated no other than mere pilot services. The expressions are aptly selected to convey that meaning; and there is nothing in the language used, or in the subject matter, from which an intention may be inferred to embrace other cases than those in which the professional assistance of the pilot is wanted. Had the Legislature intended to constitute the pilots wreckers also, a very different form of expression would have

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been proper and necessary. The pilots are required to go on board of vessels in distress and wanting a pilot. If the vessels are in predicaments where a pilot, as such, can be of no service to them, the case has not occurred which is pointed out by the rule or by the statute, in which the pilot is compelled, *ex officio*, to go to their aid, whatever may be their distress. It appears to me, that no other construction can be given to the rule or to the statute, consistently with the plain import of their language and with the purpose they were designed to answer, than to limit their operation to cases where the skill and experience of the pilot are required in the immediate duties of his office. A vessel on shore, or wrecked, or so disabled as not to be navigable, would stand in no need of the officers created by this law, or of the peculiar skill which they are appointed to exercise. Any able-bodied mariner would be as serviceable to her as a pilot. So, in the present case, if the Wave had sailed with a pilot on board, and had met this disaster, she would have needed the relief which the libellants afforded her, no less on account of having such pilot; and yet no one will contend, that when a vessel is already provided with a competent pilot, the law makes it the duty of any other pilot to go on board of her. Besides, the pilot is not required, by law, to take with him his boat's crew, or any person, to assist in manning or navigating a vessel in distress; nor is he bound to employ his boat in her aid, further than to put him on board. We are not discussing the obligations of humanity, but the extent and character of the duties which are enjoined upon pilots by virtue of their offices. The statute requires the boats to be kept in the piloting service. That ser-

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vice manifestly is, to cruise between points where pilots are put on board and taken off from vessels, prepared to furnish pilots to vessels coming in, and to take them from those going to sea. It would be foreign from that service to lade the boats with wrecked goods, or send them into port with the cargoes of vessels requiring to be lightened; and the special duty to which pilots are appointed, and for the performance of which they are to supply boats, must be abandoned, to enable them to engage in that of wreckers. If the true construction of the law and of the regulations obliges a pilot-boat's whole company, together with the boat, to be devoted to the relief of a vessel situated as the *Wave* was, then this duty must be discharged, although, at the same time, other vessels should appear off the coast wanting pilots, and such vessels must be left to the peril of their situation, whatever may be the consequences. This is not the view I take of the law. In my judgment, no pilot service was performed in this case; and, if the libellants had neglected vessels coming in and wanting them, to undertake the saving of the *Wave* and her cargo, they would have forfeited their commissions, and probably been personally subjected to damages. I think that the law and the regulations, so far from enjoining on pilots this species of service, are so framed as to be clear of doubt that nothing beyond the skill and exertions of the individual pilot put on board a vessel, are provided for or contemplated. When not neglecting the specific duties of his office, a pilot may engage in a salvage service, and he stands, in respect to it, upon the same footing as other mariners.

There are other considerations which conduce to

prove that the present case is not embraced within the purview of the State law. It is extremely doubtful whether the libellants, if they had done nothing on board this vessel but as pilots, could charge or receive pilotage for bringing her back to New-York. The second proviso to the 22d section of the State statute is, "that no pilotage whatever shall be demanded or received by any such pilot, for any such ship or vessel coming into the said port of New-York, unless such pilot shall take charge of such ship or vessel to the southward of the upper middle ground, and such vessel be at least of the burthen of seventy tons, unless such vessel shall make the usual signal for a pilot," &c. Now, although the Court should judicially take notice of the topography of New-York bay, and decide that this vessel was to the southward of the upper middle ground, yet she was making no signal for a pilot, nor was she coming into this port, nor is there any evidence that she was of seventy tons burthen.

If this is, upon the facts, not a case in which pilotage fees could be demanded, then, most manifestly, the extra compensation provided for by the 19th section of the State statute would not apply to it, for that is given only where the pilot has exerted himself for the preservation of a vessel wanting a pilot. Whatever may have been the magnitude or value of the services, they would not come within the description of those which the board of wardens is authorized to reward. It will, accordingly, be unnecessary to inquire how far it is competent for a tribunal erected by a State law, to exercise a portion of the Admiralty and maritime jurisdiction conferred by the Constitution on the judiciary of the United States, or what effect or influence the

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existence of the board of wardens would have, in ousting the jurisdiction of this Court in the recovery of pilot fees, inasmuch as this case is not shown to be one which the State law has given that tribunal authority to dispose of. And, although I entertain no doubt of the authority of this Court to afford pilots a remedy for fees, yet, in the present posture of this cause, there would be great difficulty in bringing the acts of the libellants within the statute providing fees for pilot service, or within the general principles of maritime law in regard to pilotage.

It is, also, exceedingly doubtful whether any interpretation can be given to the State act, consistently with its general scope and various expressions, which does not limit the extra compensation to be awarded by the wardens, to services rendered to vessels coming on to the coast from abroad. So the wardens understood it, for their instructions apply only to vessels which are out of port and are seeking to enter it.

My opinion upon the whole case is, that this is a case not of pilotage but of salvage service, and that the libellants are entitled to recover salvage for the services rendered the vessel and her cargo, although *infra fauces terrae*, or on waters within the territorial limits of New-York or New-Jersey. The conduct of the parties on both sides shows, that they did not consider that Hyer and his crew were rendering a pilotage service only.

The only remaining inquiry is—what amount shall be awarded to the libellants? Various considerations are regarded by the Court, in exercising its discretion in fixing a salvage compensation. The most prominent are, the peril to which the property was subjected; the

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means possessed for its rescue; its value; the degree of labor and hazard which the salvors encountered; the value of their property exposed by the undertaking; and the interests of navigation and humanity concerned in holding out liberal encouragements to induce persons to attempt the relief of vessels and their crews in distress. Enough has been before stated, to show that the Wave, when relieved by the libellants, was in a situation of great peril. It was mid-winter, the bay was full of ice, and a heavy wind was blowing. It was also late in the afternoon of the day. There was no vessel, except that of the libellants, any where in sight, and the crew of the Wave testify, that they were already so exhausted by their labors, that they could not have kept their vessel afloat more than an hour and a half longer. It is, however, suggested in some of the proofs, and was much pressed in argument, that the necessity for the interference of the libellants was not so imminent, as the Wave had anchored at so short a distance from shore, that she might have been easily beached, and her cargo and crew probably saved without loss or serious risk. The argument rests upon mere supposition. The ice made out some distance from the shore, and there is no evidence that it could have been penetrated by the Wave, or that she could have touched ground before reaching it. Nor was she in a condition to make the effort. She was water-logged, and had lost her steerage, and her crew depose that, when she anchored, they dared not bring her on the wind, for fear she would capsize. These facts show, that if she was not entirely unmanageable, it would have been a very dangerous, if not hopeless attempt, to endeavor to run her on shore. But, furthermore, admitting she

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could have been run aground, we are not only to regard the existing perils which surrounded her, but, how far her condition would probably have been benefitted by that change, ought also to be taken into consideration. The wind was from the northeast through that night, with a heavy fall of snow. The next day and the day after it blew with great violence, so that the Wave required both anchors to secure her in the anchorage to which the libellants had taken her, and where she had the advantage of land shelter. The opinion of some of the witnesses is, that she could not have stood the gale at all in her unsheltered position, if aground, and must have immediately gone to pieces. In such case, both vessel and cargo must have been totally lost, and very little chance would have existed for saving the lives of the crew. The services of the salvors must, accordingly, be deemed meritorious on their part, and of extreme necessity to all interested in the Wave. They were rendered with great promptitude, skill and diligence, so as not only to save the property, but to secure it against the injury it was then incurring. The cargo saved, after all damages deducted, was appraised at \$9,537 86, and the vessel at \$1,500. Although the claimant was thus benefitted by these services, no serious personal risk or hazard of property was encountered by the libellants. They loaded the pilot-boat, stopped the leak of the Wave, and got both vessels under weigh in about three hours. During that time, they labored with great activity and good judgment. Every man was employed to the extent of his ability. Some additional fatigue and delay were also incurred in towing the Wave, and in coming to anchor with her once before reaching Prince's Bay, but those services were

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not attended with any extra hazard of life or property. The pilot-boat was valued at from \$2,500 to \$3,000. These circumstances show nothing which exalts the salvage in this case to one meriting a prodigal reward. Courts do not look alone at the benefits received by the owner of the property saved. They regard, also, the character of the service, and the degree of compensation which would, under like circumstances, command similar relief. I shall decree that the libellants receive one-tenth part of the value of the vessel and cargo, as appraised. I might feel supported by authority in giving a larger compensation. Lord Stowell allowed a king's ship, for saving a merchantman, one-tenth of ship, cargo and freight. (*The Mary Ann*, 1 Hagg. 158.) Judge Hopkinson allowed above one-ninth of all saved to pilots, where the services were very trivial, and not of indispensable necessity to the vessel. (*Hand and others v. The Schooner Elvira*, before cited.) But the value of the property saved in this instance, makes, in my estimation, the compensation to the libellants, if it is fixed at one-tenth, adequate for the services rendered.

The share to be allotted to the apprentices is not to be paid to their master, but to them individually. (*Mason v. The Blaireau*, 2 Cranch, 239, 270.)

Decree accordingly, with taxed costs to the libellants, and \$50 for counsel fees.¹

¹ This case was taken, by appeal, to the Circuit Court, where the decision of this Court was reversed. It is understood that that Court held that the danger in which a vessel may be, does not lessen the duty of a pilot to devote himself, as such, to her rescue; that when a vessel is in distress, and is found in that situation by pilots on their cruising ground, it is their duty, as pilots, to bring her into port; that if their services have been extraordinary, they are entitled to extra pilotage therefor, to be determined according to the laws of the State

Saunders v. Buckup.

THOMAS SAUNDERS

vs.

BARTHOLOMEW BUCKUP AND ANOTHER.

A master cannot justify an assault and battery on a seaman with a dangerous weapon, by showing that the weapon was casually in his hand, and was used by him in a moment of excitement, under circumstances which would have justified some punishment of the seaman. •

The Court, in estimating the amount of damages to be given for an assault and battery, will have regard as well to the conduct of the libellant as to that of the respondent.

A Court of Admiralty discourages actions for damages on account of obsolete grievances.

Where, in a libel for an assault and battery by a master, the mate, who was a witness of the transaction, but was in no way connected with it, was joined as a party to the suit with the master, the Court will presume that this was done to render the mate an incompetent witness, and will consider that fact in estimating damages.

April 5th, 1831.

THIS was a libel *in personam*, for an assault and battery committed at sea by a master upon his cook, on the 7th of February, 1827, on a voyage from New-York to Vera Cruz. The master was cracking nuts upon the quarter-deck with a light hammer, when word was brought to him that the cook was scuffling

of which the port out of which they cruise is a part; and that the laws of the States in relation to pilots are adopted by Congress, and supply the rule of reward to those officers. It was admitted that pilotage was of Admiralty jurisdiction, and that pilots might be salvors when they went beyond the duties imposed upon them by the statute under which they acted. The opinion of the Circuit Court not having been published, and the transcript of it not being found, the views of that Court cannot be stated more fully. The points involved in this case have since been before the Supreme Court of the United States, in the case of *Hobart v. Drogan*, (10 Pet. 108,) and the opinion of the District Court, as here presented, is believed to be in harmony with the law as now understood.

with the mate. He ran forward, and discovered, according to the testimony of one of the witnesses, that the cook was overpowering the mate; whereupon he knocked him down with the hammer he had just been using, and which he had still in his hand. The libellant fell immediately, and bled freely from the head, and was, for a few moments, insensible. The wound was said to have been very slight, and he was walking about the deck the same day. The libel was filed on the 6th of October, 1830, against the master and the mate.

Washington Q. Morton and Henry M. Western, for the libellant.

George W. Niven, for the respondents.

BETTS, J.—The libel in this case is extended to great length, and is full of extravagant and declamatory assertions regarding the nature of the injury which is the subject of this suit. Upon these inflamed and exaggerated representations of the libellant, under oath, as to his great wrong and suffering, I had been induced to order the master to be arrested and held to bail in two thousand dollars. The proofs entirely fail to support the libellant's statement, further than to show that an assault and battery was committed upon him with an improper instrument. Though the hammer, which was the implement used in this case, is proved to have been light and small, it was an improper and dangerous weapon to use in such a manner, and the result showed the peril attending the act. It appears that the conduct of the master towards the libellant had been

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unexceptionable previously to the occurrence, and that he was kind and attentive to him as soon as the injury was inflicted. Moreover, the conduct of the libellant, on the occasion, was highly reprehensible, and deserved punishment. Whatever may have been the origin of the dispute between him and the mate, it was a breach of order and discipline, amounting to mutiny, for him to be engaged, under any circumstances not necessary for his self-defence, in a conflict with an officer of the vessel. At the same time, a master will not be allowed to exercise undue violence towards his crew, or, most especially, to use improper weapons for the purpose of chastising a seaman, unless under circumstances so urgent as to call for instant and extraordinary measures for the rescue or defence of his under officers. All the testimony shows that, though this was not such a case as would justify the use of a perilous weapon, the master was actuated by no ill-will towards the libellant, and that it was entirely casual that he struck with the instrument used by him. It was not procured for the purpose. It chanced to be in his hand, and was, no doubt, used thoughtlessly, and under the excitement of the moment. There is, also, no proof that the libellant was at all disabled by the blow, beyond the stunning effects of it for the moment; and the fact that he was walking about the deck the same day, after the injury, sustains the testimony of Pell, his own witness, that the wound was otherwise very slight.

If this were all the case, the Court might be disposed to inflict severe damages on the master, for example's sake, that it might be understood by men in this important and delicate trust, that they must act cau-

tiously, under the influence of reason, and not of impulse or fear, in applying force to their crew. The master of a ship should acquaint himself accurately with the character of an offence before he proceeds to punish it, and should judge soundly of the degree of force suitable for bringing his men to subordination when they are violating their duties. He must not consider himself entitled, at his mere option, to apply the last degree of violence to a seaman. The Court must see that in what he did he was governed by a rational discretion; and the Court is always ready to afford him the benefit of the most liberal intendment, to uphold his authority in the varying exigencies attendant upon his duty to his ship's company, his owner, and the mariners who are subjects of his treatment.

There are, however, circumstances in this case which ought to be brought into view in determining the sum in which the master shall be amerced. Although damages are often awarded for the purpose of punishment, yet the Court will notice that those damages go into the pocket of the individual who institutes the action; and, unless that consideration is allowed its proper weight, what may be designed as a punishment for the malfeasance of one party, may operate as a reward for the improper conduct of the other. The libellant was, in this case, a wrong-doer. He was amenable to punishment on the spot, and, had he been struck with a rope, or a stick of moderate size, and had the same consequences followed, the Court would have held the master, if not wholly justified, yet so far excused, that but a nominal fine would have been imposed upon him. The kind of weapon used fur-

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nishes the whole foundation for the libellant's action. The Court has already observed that it was improper and unjustifiable in the master to make use of that weapon; but it is also to be remarked that the preponderance of the testimony is, that the libellant attempts to inflame his damages, and to practise a gross imposition on the Court, by exhibiting here an instrument as the same with which the blow was struck. He produces in Court a ship-carpenter's or blacksmith's hammer, of two or three pounds' weight, having a long handle, and palpably a most dangerous weapon. • A brisk blow with it would inevitably beat in a man's head. There is no proof that such a hammer was ever on board the vessel; and the witnesses unite in declaring that they had not seen it, and do not believe the one which the master used was at all of that kind or magnitude. A lady witness says that her little boy, five years of age, was accustomed to crack nuts with the one the master was using. The Court is compelled to receive this attempt of the libellant with the more distrust, because of his sworn representations laid before the Court to obtain the exorbitant bail ordered in the case. Those sworn statements he did not attempt to support on the trial; on the contrary, his own witness disproved their verity.

Again, the libellant permitted this matter to rest for nearly four years before he brought suit. Had his action been at law, it would have required only a very short time to bar its prosecution, by the statute of limitations. No excuse is assigned for this delay. A jury will, under such circumstances, always consider the suit as raked up to extort money or gratify malicious feelings, and, though bound to give a verdict for the

plaintiff, if four years have not elapsed, will rarely go beyond nominal damages. The statute of limitations does not apply to this Court as an obligatory law; (*The Utility, ante, p. 218*;) but its provisions, as well as the peremptory exceptions of the civil law, are always regarded, in Admiralty, in adjusting the equities of parties. Our State statute bars an action for assault and battery after four years. (2 *Rev. Stat.* 296.) But, by the civil law, such an action was required to be brought within one year. (*Code*, 9, 35, § 5.) It is a cardinal rule with this Court, not to intermeddle with stale demands, much less to give countenance to actions founded on obsolete quarrels and grievances. The Court will presume, that if this suit had been brought on the return of the libellant to this country—(and no reason is assigned in the proofs why he did not return in the same vessel)—it would have been put in possession of a much more accurate and satisfactory account of the whole transaction. The action was delayed for nearly four years, and was then brought against the master and mate. The effect of this mode of prosecuting it is, to shut out the testimony of the mate, who would be the witness most competent to state the occurrence in all its circumstances. He had no connection with the master in giving the blow which is the *gravamen* of the suit; and, though he might be liable for an assault and battery which preceded that blow, yet the case affords no explanation of the reason for his being made a party to the action brought for the consequences which followed the blow, and the inference seems warranted, that this was done to preclude his being a witness in behalf of the master.

Under all these circumstances, though I feel con-

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strained to award damages as a reproof to the master for the indiscreet and improper use of the instrument he employed, yet I do not consider this a case in which the libellant is entitled to more than a moderate compensation. Accordingly, I decree that the master pay \$10 damages and costs.

Decree accordingly.

THE GALAXY.

In a case of derelict, where there are no peculiar circumstances, Courts of Admiralty award a moiety as salvage.

In distributing the salvage money, in a case where the salving vessel was exposed to no extraordinary risk or unnecessary deviation from her voyage, and where the salvage amounted to less than \$2,000, one-fourth was awarded to the owners of the salving vessel, and the remaining three-fourths were divided among her master and crew—the master receiving four shares, the mate two shares, and seven seamen, including the cook, one share each.

May 18th, 1831.

THIS was a libel *in rem*, for salvage, against the schooner Galaxy. The facts were these: The Galaxy sailed from Baltimore on the 4th of April, 1831. On the 16th of that month, off Cape Hatteras, she encountered a gale of wind, in which her masts and spars were carried away. Her master and crew remained by her until the 18th, endeavoring to work her into some port, and refused to leave her, although spoken by two vessels, and urged to do so.

On the 18th, they abandoned her in latitude 35° 30' N., and were taken into Charleston by a vessel called the Invincible. On the 20th, the Galaxy was discov-

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ered and boarded by the brig Union, in latitude 36° 9' N., and longitude 72° 50' W. She was then a complete wreck. Her spars, sails and anchors were all gone, and nothing could be found on board indicating where she sailed from, where she was bound, or to whom she belonged. She had a full cargo, consisting of flour, whiskey, hams, &c., which had received no injury; and it was resolved, by the master and crew of the Union, to attempt to save the vessel and cargo. Jury-masts were accordingly rigged, necessary sails were supplied from the Union, two or three men were put on board the wreck, and she was taken in tow by the Union. Both vessels arrived safely at New-York on the 24th of April. The Union was on a voyage to New-York.

BETTS, J.—The claimants do not deny that this is a proper case for the allowance of salvage. They only insist upon circumstances which they suppose should diminish the allowance. These are, that the Union was not diverted from her course or delayed; that no lives were saved from the wreck; that no additional hazard of life or health was imposed on the salvors, by their efforts to save the vessel; and that she was towed easily into this port in about four days.

Another particular is brought to the notice of the Court, which, if proved, would deprive the salvors of all claim to salvage, namely, that there has been an embezzlement by them of some part of the cargo of the Galaxy. It appears, by the marshal's account of sales, that twenty-three barrels of flour and one barrel of whiskey less than the bills of lading given by the master of the Galaxy expressed, were found on board.

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So, also, some hams and dried beef were missing. The master of the *Galaxy* proves, that the *Invincible*, which took him and his crew off the wreck, took away thirteen barrels of flour, and, he believes, some hams and dried beef, for fear her provisions would be short for the whole company then on board. Not only does each individual of the crew of the *Union* deny that anything was taken by that vessel out of the wreck, but their testimony is very fully supported by that of a passenger on board the *Union*, who has no interest in this suit. If any embezzlement occurred after the wreck arrived at this port, it could be proved by the pilot, and by other officers who were constantly on board until her arrest in this case; but they have none of them been examined by the claimants. The wreck had been abandoned two days or more, before she was fallen in with by the *Union*. In that interval, as she was directly in the track of coasting vessels, she may have been boarded by other vessels, or the *Invincible* may have removed a greater quantity of supplies than the master of the *Galaxy* was apprised of or recollects, or the bills of lading may not have stated the true quantity on board. The testimony does not, in my judgment, fix the embezzlement upon the salvors, and they cannot be denied compensation for that cause.

The services of the libellants were eminently meritorious and important to the wreck. She had been wholly abandoned, and was left in a condition which must very soon have resulted in her total loss. She was navigated for three or four days, with great fatigue to the crew of the *Union*, and with some considerable degree of exposure both to them and their vessel. For, by dividing the crew, each vessel was so short manned as to

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require every individual to be constantly on duty, and an occurrence of boisterous weather would, probably, have been fatal to both vessels. The labor and hazard incurred in saving this property were, therefore, such as Courts of Admiralty always favor. The rate of compensation rests in the discretion of the Court, and is made to conform to the particular equities of the case. It accordingly varies, in a case of derelict, from a very trifling per centage upon the property saved, to two-thirds of its value. Judge Story collects a numerous list of cases on the subject, and concludes that, in cases of derelict, Courts of Admiralty adhere to a moiety as the favorite amount, and require some peculiar circumstances to vary it. (*Abbott on Shipp. by Story, ed. 1829, 397, note 1.*) I perceive nothing in this case to vary the allowance from that standard. The reward it affords is sufficient compensation for the services performed, and is a reasonable premium to induce the rescue from like peril, of property similarly circumstanced. I shall, accordingly, after deducting from the gross proceeds the costs of the libellants and of the officers of Court, decree to the salvors one-half of the nett proceeds of the vessel and cargo.

The next inquiry respects the distribution of the salvage-money amongst the salvors. The vessel is entitled to share in the distribution, on account of her services in the adventure; but the ratio in which the vessel shall take, as amongst the salvors, seems no more determinate than the one by which the salvage itself is to be measured. The vessel was the essential instrument in effecting the salvage, and shares as salvor because put to risk in the adventure; and, as an inducement to owners to permit their masters to use their

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ships in the relief of vessels or property wrecked, or in imminent peril, it is meet that owners should participate in the benefit in some ratio to the hazard and value of their property so exposed. Where the risk of the vessel is extreme, and the salving vessel and cargo are of large value, the owner's share should be proportionably enlarged. In the case of *The Blaireau*, (2 *Cranch*, 240,) the Court allowed the owners of the vessel and cargo one-third of the amount of salvage decreed. The exposure of the vessel in that case was greatly beyond that incurred by the *Union*; and, accordingly, that case aids the decision of this, only by indicating that the measure of reward to the salving vessel should be generous. Where a master, in charge of a valuable vessel and cargo, abandoned his voyage to bring in a wreck found derelict, and the owner protested against his conduct, and immediately displaced him from his command, I considered the merit of the salvage service to belong to the vessel, and held that the master and his crew ought to receive no more than a *quantum meruit* for their services as laborers. (*The Waterloo*, ante, p. 114.) But there is no exception, in this case, to the conduct of the master and crew. The owner of the *Union* appears in Court as a witness in support of their claim, and it must, therefore, be assumed that he ratifies and approves their conduct.

It does not appear whether or not the *Union* and her cargo were insured. But, if they were, and if the policy was forfeited, the deviation was merely technical. There was no wilful misconduct in the crew. The *Union* did not leave her voyage; but, finding this wreck off the coast, in the direct track of her homeward route, towed it into her port of destination. The

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Union and her cargo were valued by her owner at about \$30,000. The wreck and her cargo brought, at auction, about \$4,000. Had the vessels been of about equal value, the allowance to the salving vessel would be proportionably less. Under all the circumstances, I shall direct one-fourth of the amount of the salvage to be paid to the owner of the Union, and the remaining three-fourths to be divided into thirteen equal shares, to be distributed as follows—four shares to the master, two shares to the mate, and one share to each seaman, including the cook.

Decree accordingly.

MICHAEL FARRELL AND JOHN CAMPBELL

vs.

FRANCIS FRENCH.

If a master neglects, before leaving an intermediate port, to inquire at the hospital for seamen who have gone there from his vessel, and who, there is reason to suppose, might be able to rejoin him, and sails without them, he is liable to an action by them for damages for the loss of wages.

The measure of damages, in an action by a seaman for being wrongfully discharged or left at an intermediate port, is governed by the equities of the case, and is usually the wages for the voyage, and an allowance for expenses, unless the seaman has been engaged in other profitable employment; and the burden is on the master to show such employment, and the amount earned therein, by way of abatement.

June 15th, 1831.

THE libellants were seamen upon the ship Great Britain, of which the respondent was master, and, in the course of the voyage to this port, obtained leave, on account of sickness, to go on shore to the hospital at

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Savannah. The respondent shipped other men, and afterwards, when ready for sea, heard that the libellants had recovered and had been seen in the streets of Savannah, but he made no inquiries for them at the hospital, and sailed without them. The present action is for damages for the loss of wages. The other facts are sufficiently stated in the opinion of the Court.

Edwin Burr and *Erastus C. Benedict*, for the libellants.

Charles O'Connor, for the respondent.

BERRS, J.—This action may be sustainable upon the principle that, by the misconduct of the master of the vessel, the libellants have been prevented from performing their contract and earning the wages stipulated to be paid them. It is not to be treated as a suit for wages, but as one for damages for the loss of wages to the libellants by the fault of the respondent; and I think the proofs make out a case of that character. In estimating the damages in such a case, a Court of Admiralty is governed by the equities connected with the transaction.

Farrell, on his examination as a witness for his co-libellant, testifies that the shipping notary told them, the day they left the hospital, that the ship had dropped down to go to sea, and that the master had several days before shipped the men he wanted. It is satisfactorily proved, by other evidence, that the master shipped six or seven men the day after the libellants went to the hospital, and that, on the day they left there, the ship dropped down a mile, with intent to go to sea.

There was, therefore, a plain manifestation of intention, on the part of the master, to go to sea without regard to these men; and, whether they were actually out of the hospital before or after the time when the vessel got under weigh, cannot vary the equities of the case in respect to them. The master was not expecting or endeavoring to reclaim or employ them.

Where the dismissal or abandonment of a seaman has occurred in a foreign port, not only are wages decreed for the whole voyage agreed, but, by the French law, an allowance is made to him for the expenses of return. This provision is approved by one of our most learned jurists in this branch of the law. (*Emerson v. Howland*, 1 *Mas.* 45, 54.) The cardinal object is, to secure an indemnity to the sailor; and it is, therefore, well doubted, whether the rule laid down by *Abbott*, (*ed.* 1829, 442,) can be supported, if it is intended as an unqualified proposition that the wages earned by the seaman in other employment shall be deducted. If no positive loss is sustained, there would still be a measure of injury which equity would not overlook, resulting from throwing a man out of the employment he had agreed for, and imposing upon him the necessity of seeking another and a different one. The degree of this injury may not always be very accurately expressed in damages, yet there is a fair foundation for some compensation, and one which should correspond somewhat to the nature of the wrong and loss. A wanton wrong inflicted upon a sailor, and attended with serious personal inconvenience to him, should be differently regarded from an inadvertent or well-intentioned non-observance of the contract on the part of the master.

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In the present case, it was clearly the duty of the master to have sought the libellants, at least at the hospital, before making sail. It is most probable, upon the proofs, that both of them would have been found; and then the respondent should have seen that they had the means of transport to his ship, or to their home port. That he wanted more men than he was able to hire at Savannah, affords evidence that he did not design leaving the libellants. But, if he did not wish or intend to depart without them, he certainly gave too ready credit to a loose rumor that they had left the hospital, and did not mean to continue the voyage. The slightest diligence on his part would have obviated such misapprehension; and, as it was his duty to make the inquiry, he must bear the consequences of having neglected it.

Some time after the respondent sailed, the libellants shipped for northern ports. Campbell received \$12 per month, and, on his arrival at New-York, re-shipped for Savannah. It does not appear what Farrell received, or whether he obtained further employment on his return home. The *Great Britain* completed her voyage, and returned to New-York on the 7th of June, being three months from the day of her leaving Savannah. The libellants had each received \$12 in advance, and there was nearly another month's wages due when the vessel sailed from Savannah. It was incumbent on the master to show that the libellants had been in equally profitable employment, or an amount they had earned, in order to entitle himself to an abatement on account of their earnings. But, inasmuch as nothing but circumstantial evidence can well be expected upon this point, and as there was a demand for

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seamen, at increased wages, at Savannah, I am disposed to consider the evidence before me as establishing, that the libellants had other and profitable employment, and that an allowance of two months' wages to each of them, will fairly cover the loss of time and expenses they may have incurred in Savannah and the northern ports, before they found such employment, and also that the wages they gained, while employed, were at least equal to those they were to receive on board the Great Britain. Accordingly, I decree the payment of \$24 to each of the libellants, with costs.

LEVI MARTIN *vs.* JACOB ACKER.

A hand on board a sloop of over fifty tons burthen plying on the Hudson River, between New-York and Catskill, is a seaman; and an action *in personam* brought by him against the master and owner of the sloop, to recover his wages, is within the jurisdiction of this Court.

The respondent in such action is bound by his acquiescence in an account stated.

July 9th, 1831.

THIS was an action *in personam*, for seaman's wages. The defence was, that the libellant was not a seaman but a boatman, that the matter claimed was not within the jurisdiction of the Court, and that the demand had been satisfied. The libellant served as a hand, and as captain's clerk, on board a sloop of over fifty tons burthen, belonging to the respondent, and assisted in navigating her for two seasons up and down the North River, between New-York and Catskill. The respond-

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ent was also master of the vessel during the time the libellant's services were rendered.

Edwin Burr and *Erastus C. Benedict*, for the libellant.

Charles W. Sandford, for the respondent.

BETTS, J.—The laws of the United States assume the regulation of all vessels of the description of the one on which the libellant served. They must be enrolled or licensed, and the men must pay hospital money the same as if on board sea-going vessels; (*Act of February 18th, 1793, 1 U. S. Stat. at Large, 305; Act of July 16th, 1798, 1 U. S. Stat. at Large, 695;*) and, since the decision in *Gibbons v. Ogden*, (9 *Wheat.* 1,) there can be no longer a doubt that the navigation from port to port in a particular State, is equally subject to the authority of the general Government with that from State to State. Those employed in conducting that navigation are properly denominated seamen. The statute which makes provision for the recovery of seamen's wages, supplies no remedy in their case, it being limited to vessels "bound from a port of the United States to any foreign port," and to vessels "of the burthen of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State." (*Act of July 20th, 1790, 1 U. S. Stat. at Large, 131.*) But that statute is never construed as interfering with the privileges of seamen under the law maritime, further than to determine the manner in which suits shall be commenced. It has, accordingly, been decided in several of the Courts of the United States, after full

consideration, that the remedies of the maritime law apply to all cases of Admiralty and maritime jurisdiction on the rivers of the United States which are navigable to the sea for boats of ten tons burthen and upwards. (*Serg. Const. Law*, 2d ed. 195, 196.) In the case of *The Thomas Jefferson*, (10 *Wheat.* 428,) the doctrines before recognised as having relation to all navigable waters, were restrained to waters within the ebb and flow of the tide. It is difficult to discern any principle upon which that limitation can be applied to one description of navigable waters in the United States more than to another. Contracts with seamen, performed or contemplated to be performed on the high seas, or within the ebb and flow of the tide, come under the Admiralty jurisdiction, within the most rigorous construction of its extent; and the jurisdiction is not lost, though the voyage is to commence or end beyond the reach of the tide. The whole of the services claimed for in this case having been rendered upon tide waters, the subject matter of the suit falls within the cognizance of this Court.

The libellant's account for his services was submitted to the respondent, each item of charge and credit was distinctly stated to him, and he made no objection to its correctness, but agreed to settle it, as stated, in a few days. One witness swears that he offered to give his note for the balance, payable in a few days. Another says, that he understood the respondent to say that a payment of \$15 84 ought to be credited, and that he and the libellant would settle the residue between themselves in a few days. The respondent now claims, in addition to the credits stated upon the account, payment for boarding the libellant during the winter, on

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the vessel, at the rate of \$2 or \$3 per week. The respondent's witness who proves the boarding states, also, that he considered the libellant as being in the respondent's employment during the time. As the board was not claimed when the account was stated and the balance acquiesced in, the inference to be drawn from all the evidence is, that the respondent considered the board as satisfied by other services of the libellant, or by payment, and that it is now set up by the respondent out of resentment at the institution of a suit for the wages. This charge is disallowed.

The libellant collected two bills for wood sold, after he left the respondent's employ. These sums are to be credited on his account. On a report by the clerk of the amount due, a decree may be entered for the balance, with costs.

THE TRITON.

Parol proof offered by a ship-owner to vary the voyage described in the shipping articles, is not admissible in an action *in rem* by the seamen for their wages.

January 14th, 1832.

THIS was a libel *in rem* for seamen's wages. The libellants alleged that they shipped at Havana, on a voyage "to Cronstadt, in Russia, and thence to a port of discharge in the United States," at stipulated wages. The claimants (the owners of the ship) alleged, that the agreement was only for a voyage to Cronstadt, and had been altered without their knowledge or consent, on the

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home voyage of the ship. The shipping articles, as produced, corresponded with the allegations of the libellants; and the claimants offered to prove, by parol, that the words following "Russia" were inserted after the articles were signed, and whilst the vessel was on her return voyage, and that the agreement with the libellants was to terminate at Russia. The libellants objected to the proof as incompetent, but the Court ordered it to be read *de bene esse*, reserving, till the final hearing, the question of its admissibility.

Erastus C. Benedict, for the libellants.

John B. Staples, for the claimants.

BERRS, J.—There is a disaccordance in the statements of the claimants' witnesses, which weakens the force of their testimony. It is also contradicted, in some important particulars, by the evidence on the part of the libellants; and, upon the proofs before me, supposing the claimants' depositions to be admissible, I cannot say that the articles, if altered at all, were altered on the return voyage of the ship, and not before she left Havana. But, if the articles have been altered, is it competent for the owners to impugn them as against the seamen? The statute enjoins upon the master the duty of having written articles subscribed with his seamen, fixing the voyage and wages. The English act, from which ours is borrowed, declares the contract to be "conclusive and binding;" but those terms are not introduced into our statute, though the provision that the contract and log-book shall be produced, to ascertain the wages due, is tantamount to

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them in effect. The interpretation of the contract, accordingly, has been, in this country, that a seaman is concluded by the written agreement as to the amount of wages, and cannot recover more than is stipulated in the contract; (*Bartlett v. Wyman*, 14 *Johns.* 260; *Johnson v. Dalton*, 1 *Cow.* 543;) and it is believed that no case can be produced in which a seaman has been permitted to disregard the written contract, unless he has satisfied the Court it was executed through fraud or imposition practised upon him. Though it is out of his custody, and in that of those opposed in interest to him, the Courts will listen to no proof, however clear and full, setting up an agreement different from the written one, until that is shown to be void as against the seaman. The objection to such testimony, when offered by the owner or master against a seaman, would be of still greater force. They are the parties who propose, prepare and hold the contract. Alterations can, therefore, be rarely made in it, without their knowledge or to their prejudice. On the contrary, the men cannot be presumed to have access to it after their signature, nor to have capacity to change its terms, or annex new agreements to it, even if disposed to do so; and it would be subversive of every precaution and safeguard designed for the protection of the crew, to permit the owner to curtail or vary, by parol proof, the engagements of the written articles, or substitute different stipulations in their place. This would, in effect, nullify the act of Congress; for, the obligation upon the master and owner to enter into a written contract with their crew, would be useless, if they might afterwards efface it by parol evidence. When, therefore, the owner produces the written contract in Court, it must have the effect "to ascertain the matter in

dispute," unless he is enabled to prove that it has been fraudulently changed by the seamen.

In the present case, the agreement was deliberately entered into, and the owners now insist upon all the provisions that are binding on the seamen, as in full force against them, and have also excepted to, and procured the exclusion of evidence offered by the seamen to show that the real contract for wages was different from that inserted in the articles. They furthermore claim a forfeiture of wages because of a breach of the articles by the seamen. There would be something revoltingly incongruous in adjudging, for the benefit of the owners, the contract to be conclusive against the mariners, as to wages or other privileges, and yet in exonerating the owners from one of its most important provisions in favor of the seamen, upon loose oral proofs that that provision was not originally part of the agreement. The rules of the common law in regard to parol proof in contradiction of a written contract, ought not to be relaxed, in behalf of an owner or master, with respect to shipping articles. When proceeded upon in Courts of law, they are construed with all the strictness of other agreements, even as against sailors. (*Webb v. Duckingfield*, 13 Johns. 390.) Applying the like principle in favor of the seamen, the ship-owner cannot substitute an oral agreement in place of one required by law to be in writing, (*Starkie on Ev. pt. 4, p. 999,*) nor vary the written contract by any species of parol evidence, (*Id. p. 1,001,*) except in cases of fraud or duress.

I shall, accordingly, decree wages to the libellants for the home voyage, according to the shipping articles as presented in Court, with costs.

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owner, that he may be enabled to ascertain that his cargo is delivered without embezzlement, and to collect his freight before being obliged to make disbursements for wages. The seaman is bound to delay his action, that the owner may secure those advantages. It is plain that the act has relation only to the specific voyage and services for which the suit is brought; and, when the vessel has accomplished one voyage with full unlivery of her cargo, it matters not that she has made other voyages, and, when proceeded against, happens to be again in the same port at which the voyage sued for terminated and the wages claimed were payable. Those wages have no connection with the after employment of the vessel, or the after service of the libellant. The vessel will, in respect to such service, be considered as having left the port of delivery on an after voyage, equally as if she were found and sued in a different port. The "last port of delivery," designated in the act of Congress, necessarily means the port of final delivery of the specific cargo upon which the wages accrued, and in respect of which the suit is brought. There is, accordingly, nothing in this branch of the defence.

I think, also, that the claimant, by appearing and contesting the claim upon the merits, must be deemed to have waived all right of exception to the regularity of the proceedings. Proofs have been taken by both parties under the issue joined, and, after that, the claimant cannot be permitted to allege that the libellant instituted his action without observing the requisite formalities. The claimant can take no higher advantages by this motion than he could under a plea in abatement, or under a declinatory exception of that

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character; and such objection to a prior irregularity is not regarded by the Courts after full contestation of the action upon the merits. (2 *Browne's Civ. and Adm. Law*, ed. 1799, 30; *Id.* 89, 104, *et seq.*; *Pothier, Analyse des Pand.* 360, 361.)

Motion denied, with costs.

ROBERT INGRAHAM *vs.* STEPHEN ALBEE.

A master who receives back into his service a seaman who has deserted, will be held to have waived the forfeiture of the seaman's wages.

An allowance may, in such a case, be decreed to the owner, for the time of the seaman's absence.

Semble, that a deviation from the voyage named in the shipping articles excuses a seaman for leaving the vessel, and bars the charge of forfeiture of wages.

Where, in a suit *in personam* for wages, the answer alleged, by way of set-off, payment of a board bill during the absence of the libellant from the vessel, and the evidence offered raised a strong presumption that such payment had been made: *Held*, that if the libellant would not admit the payment, the respondent might, on filing an affidavit that such payment had been made at the libellant's request, have time to procure proof thereof, and to sue out a commission or a *dedimus potestatem* for that purpose.

March 19th, 1832.

THIS was a libel *in personam*, by a seaman against a master, for wages, and for an extra allowance for services as cook. The answer set up a forfeiture by desertion, and also claimed to set off the amount of a board bill of the libellant's, paid, during his absence from the ship, by the respondent. It appeared on the hearing, that the libellant was absent from the vessel, in Havana, for some time. The evidence was contradictory as to the period of his absence, but it was proved that he

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boarded during the time for one dollar a day, and that the amount of his board bill was \$21 62. The respondent met the libellant during his absence, and asked him if he had had his spree out yet, and, on his return, received him back into service. The libellant also proved that the vessel had, before he left her, made a deviation, and proceeded upon a voyage not named in the shipping articles. The respondent offered evidence to show that the libellant was ignorant of his duties; that he could not steer in a blow, nor reef, nor heave the lead; and that, though he had rendered occasional services as cook, yet he knew little of cooking. The respondent also gave evidence going to show payment of the board bill, as set up in the answer, which is more particularly stated in the opinion of the Court.

Edwin Burr and *Erastus C. Benedict*, for the libellant.

John Cleaveland and *William W. Campbell*, for the respondent.

BETTS, J.—If the libellant has forfeited his wages by leaving the vessel, and continuing absent in Havana, such forfeiture would have been remitted by the consent of the master to receive him on board and overlook his conduct. Or, even if no condonation of that offence had been shown, it is very questionable whether the previous deviation of the vessel, and her performing a voyage not named in the articles, would not have excused the libellant in leaving her on arriving at Havana. As the case stands, no forfeiture of wages is established.

The evidence offered by the respondent shows clearly that the libellant was not an able seaman, nor a competent cook; and, had the respondent refused to receive him back into his service, and defended this action upon the ground of the libellant's incapacity to perform the duty he contracted to do, I should have thought it a fair case for a reduction of wages, and should not have been willing to allow the rate stipulated by the articles, for any portion of the time. The master was a better judge of the value of the libellant's services to the vessel than any of the witnesses the latter has called; and the master's acts in reinstating the libellant counteract this branch of the defence, at least when set up by himself. His taking the libellant back, in Havana, under the original contract, without any stipulation for a change of wages, must now be deemed conclusive, as against him, that he was satisfied with the libellant's services, and was to allow him the same rate of compensation, to the completion of the voyage. I do not think, however, on the whole evidence, that the libellant is entitled to more than the agreed wages. His occasional services as cook were not of a character to raise an equity to increased pay. Wages are accordingly decreed at fifteen dollars a month for the voyage, (four months and three days,) deducting the period of twenty-two days for the libellant's absence in Havana. The answer alleges, that the libellant's absence continued from the 16th of September to the 11th of October, a period of twenty-five days; but no evidence is furnished fixing the dates with certainty. The master claims a credit of \$21 62, the amount charged the libellant for board in Havana. The proof being that the price at the house where he

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boarded was usually one dollar per day, that is sufficient evidence of an absence correspondent to that charge; and, without noticing the fraction, I shall allow a deduction of wages for twenty-two days. The master claims the amount of this board bill as having been paid by him. The fact is stated in the answer, but the allegation is not responsive to the libel in a way to render it, of itself, evidence in the respondent's favor; and there is no direct proof that he paid the bill. There are circumstances, however, raising so strong a presumption in the master's favor, that if the payment is not admitted by the libellant, I shall allow the respondent a reasonable time to furnish further proof of the fact. It is proved that the libellant offered to ship on board of another vessel, for the purpose of having his bill satisfied; that it is usual for masters of vessels to advance the board bills of seamen on such occasions; that the respondent did so with reference to two of his seamen; and that the libellant said he did not know whether it had been done for him or not. That declaration is a plain admission that he had not paid it himself, and would probably justify my making the allowance at once, but for a declaration of the master in Havana, proved by one of the seamen, "that he would not pay for the libellant, and, if his landlord said anything about it, he would put him in prison for harboring the libellant." This leaves the point in so questionable a state, that I think it proper to demand further proofs. The master will be allowed ninety days to prove this payment, on his filing an affidavit that he has actually made it at the libellant's request, and, at the same time, taking out a commission or a *dedimus potestatem* to obtain the testimony.

Decree accordingly.

THOMAS BORDEN

vs.

CHARLES A. HIERN AND THOMAS HARVEY.

Parties may join, in one libel, causes of action arising *ex contractu*, and those arising *ex delicto*, where the causes of action are so united that the same evidence will apply to all—for example, in a suit *in personam*, a claim for wages, and a claim for damages for an assault and battery committed on the same voyage.

Seemle, that parties may join, in a suit *in personam*, causes of action arising *ex delicto* against two respondents, with those arising *ex contractu* against one of them, where the same evidence will apply to all—for example, a claim against a master and a mate, for damages for an assault and battery, and a claim against the master for wages earned on the same voyage.

Joinder of causes of action in Admiralty, considered.

Whether Admiralty has jurisdiction over a personal tort committed on board a vessel in a harbor where the tide ebbs and flows, *quere*.

A temporary and open absence from his vessel, by a seaman, without objection from the master, in an intermediate port, while the vessel is discharging or taking in her cargo, is not a desertion.

Where a libellant joined, in an action *in personam*, a claim for wages with one for damages for an assault and battery, and recovered his wages, but failed to prove the tort, and the respondent used his evidence regarding the assault and battery to resist the claim for wages: *Held*, that the respondent should recover no costs, and that the libellant should recover costs, deducting the costs of taking his evidence to prove the assault and battery.

March, 1832.

THIS was a libel *in personam* against Hiern, the master, and Harvey, the mate, of the ship Ajax. The libel alleged that, on the arrival of the ship at Liverpool, from New-York, the master ordered the libellant on shore, and refused to pay him his wages, or to allow him to return to New-York in the ship, and left him at Liverpool, carrying away his chest and clothes, with a large sum of money; and that both of the respondents committed various assaults and batteries upon him, with great severity and cruelty, within the port of New-

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York, and at sea during the course of the voyage. The libellant claimed to recover against the master his wages and the value of his chest and clothes, and to recover against both defendants damages for the several assaults and batteries. The answer excepted to the joinder of the various causes of action in the libel. It also set up, in defence to the claim for wages and for the value of the chest and clothes, that the libellant wilfully deserted the ship at Liverpool, was duly logged as absent, without leave, for more than forty-eight hours, and never returned, and that the chest left on board was examined and found to contain nothing of any value. It also justified the alleged assaults and batteries, as moderate corrections, necessary to subdue the mutinous spirit of the libellant and maintain the discipline of the ship. The facts of the case are sufficiently set forth in the opinion of the Court.

Washington Q. Morton and J. D. Delacey, for the libellant.

Abel T. Anderson and Samuel G. Raymond, for the respondents.

BETTS, J.—This is a compound action against a master and a mate. It seeks a recovery of wages, and of the value of a chest of wearing apparel, against the master, and damages for alleged assaults and batteries committed by the respondents jointly, upon the libellant, in this harbor, and at sea during the course of the voyage stated in the pleadings. The answer replies, with great minuteness, to the allegations of the libel; and the pro-

ceedings in the case are diffuse, and crowded with matters not essentially connected with the merits of the action. There are not, in the multifarious proofs, any special features which require discussion.

The facts proved are, in substance, that the libellant was taken on board the ship at this port partially intoxicated, and was disorderly and disobedient in his conduct, and that the master and mate forced him on board. But it is not proved that they employed a greater degree of violence than was necessary to enforce subordination. Whatever violence, however, was applied, and whatever wrong, if any, was done, took place at the wharf, in this port, where the ship lay. Only a single case of personal chastisement at sea is proved. That was inflicted by the mate with a small rope's end, by the orders of the master, because of the flagrant inattention to duty and disobedience of orders by the libellant, whilst he was at the helm of the vessel, and was no more in degree than was justified by the circumstances. That portion of the charge is accordingly dismissed as to both of the respondents.

The master fails to sustain his answer in respect to the desertion charged against the libellant, while the libellant does not prove that he was put on shore by the respondents, or refused a passage home, but establishes the fact that he offered himself to the ship the day of her departure from Liverpool, and was told by the mate that he was not wanted, and that his place was supplied by another man. One was in fact shipped and came home in the vessel, and the libellant procured a passage for himself in another ship. On his arrival in New-York, he found the Ajax in port, and demanded his wages and his chest and wearing apparel, but ob-

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tained neither. On these facts, the questions presented are: 1. Whether these diverse matters may be embraced in a single action; 2. Whether the Court has jurisdiction of the tort committed within this harbor; and 3. To what compensation, if any, the libellant is entitled.

1. With regard to the joinder of causes of action, the division and nomenclature of actions at common law afford no rule of decision for Admiralty Courts; because, as a general rule, the remedy under the civil law is commensurate with the right established by the pleadings and proofs in a cause, and is not made dependent upon the specialties of form which embarrass a suit at common law. (*Wood's Civil Law*, b. 4, ch. 3, § 3, *et seq.*) I speak now of that advanced state and condition of the civil law, from which the doctrines and usages of the English equity and Ecclesiastical Courts were drawn, and do not regard, as applicable to the inquiry, the formed actions and other niceties which at one time entered into its jurisprudence and entangled its remedies.

There is an obscurity in respect to the right of a libellant to unite distinct causes of action in an Admiralty suit, which is essentially owing, I apprehend, to the propensity of the bar and Courts, in modern times, to identify the pleadings of this Court with those of common law tribunals. I do not discuss the utility of the proposed transmutation, or inquire when it may have been countenanced in our own maritime Courts, or in the English Admiralty. The course of procedure in this country must be essentially at the discretion of each individual Court, until a permanent direction shall be given to it by the paramount authority of the Su-

preme Court. No *formula* of pleading, in this respect, has as yet been prescribed by that high authority ; but it has pointedly implied, in its adjudications, that a libel may embrace causes of action arising *ex contractu*, and those arising *ex delicto*. (See *The Amiable Nancy*, 3 *Wheat.* 546 ; *S. C.* 1 *Paine*, 111.) And I think there is ground to question the propriety of restraining Admiralty suits to single causes of action. The reason which sustains that practice at law, very slightly, if at all, applies to the pleadings in Admiralty, where no regard is paid to the names or forms of actions, or to modes of complaint or defence, and where it is never made a point of pleading whether the case rests upon contract or tort. Laying out of view the uniting of the mate with the master, in a suit for wages, this case illustrates what I regard as the spirit of the Admiralty practice, and its advantages on this very head. The testimony to support and resist the claims to wages and to damages is essentially the same, because the inquiry, whether or not the conduct of the libellant on the voyage was wrongful, goes directly to the merits of the claim and defence, as to both causes of action. The expense and delay of taking the evidence at large in two suits, and of having two distinct trials on the same facts, must be incurred at common law, whilst this Court hears all the proofs and disposes of the rights of both parties in one action.

The union of the mate with the master, as a joint trespasser, was allowable ; and, no claim being made against the former for wages, the insertion in the libel of charges against the master for that cause, in no way prejudices the mate, or embarrasses the determination of the case. It is not necessary to speculate, in this:

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instance, upon the admissibility of the form of pleading in that respect, because no case is made against the mate by the proofs, and he stands discharged of the action, on the merits.

2. The next consideration is as to the jurisdiction of the Court over the claim to damages for the assault and battery alleged to have been committed in this port. The libellant having failed to support this portion of his case against either respondent, the Court will not conclude itself by any present speculation on the question of its jurisdiction. The line of discrimination, if there be one, between a Federal jurisdiction and a municipal jurisdiction over torts committed on board of vessels within this harbor, where the tide ebbs and flows, is not one easy to be defined or discerned. There are persuasive reasons for excluding from the cognizance of the Federal Courts transactions specially appertaining to the supervision of police and municipal powers. Yet, there are several authorities which seem to consider the Admiralty jurisdiction as one and the same over torts committed within tide-water harbors, and over torts committed at sea, although the torts be not specifically maritime trespasses, or of a maritime character otherwise than as to their locality. (*Sergeant's Const. Law*, 202; *De Lovio v. Boit*, 2 Gall. 398.) I am not, however, required to examine the question, in this instance, and shall leave the point open for fuller consideration, when it may come up as the one controlling the decision of the Court.

In my judgment, the libellant has established no right of recovery against either of the respondents on account of the alleged personal wrongs, even if there were no question of jurisdiction that could interfere

with his action, and the libel must be dismissed as to the respondent, Harvey, with full costs to be taxed.

3. The master does not, in my judgment, support his answer charging the libellant with desertion at Liverpool. It does not appear that the libellant left the vessel clandestinely, or with intent to abandon her. He might have been called back at any time, had the master or his officers desired his services. It is obvious, upon the proofs, that their purpose was to leave him in Liverpool, and that they seized upon his temporary absence as a means of exculpating themselves. On the whole evidence, I do not find that the libellant was absent from the ship for forty-eight hours at any one time, without either direct or implied leave. The men necessarily boarded and lodged on shore, and shore laborers are generally employed at the docks to discharge and load ships. When the crew are put to that service, the usage is, to apprise them distinctly, on the arrival of the ship, that the work is to be done by them. It would be springing a trap upon them, if a master might stand silently by, and allow heedless and thoughtless sailors to wander about the docks or the city whilst a cargo was being unladen or taken on board, and might, without personal orders or notice to them to remain with the vessel, cause them to be logged as deserters, and leave them behind destitute. The master has failed to justify his conduct on this occasion, or to show reasonable cause for abandoning the libellant in Liverpool and denying him his wages. I shall, therefore, decree to the libellant his full wages for the voyage out and back, with an additional allowance of ten days' wages for the time employed by him in Liverpool in obtaining a passage

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home. He is also entitled to full compensation for the value of his chest and effects brought away in the ship, and not restored to him. I shall not examine into their value, but refer that question to the clerk, to take further proofs on both sides, and ascertain and report thereon to the Court. The expense incurred by the libellant in taking testimony in support of his claim to damages for assault and battery, must be borne by him. The defence to that charge is complete. No costs, however, are decreed to the respondent, Hiern, against the libellant, because he took and used his proofs in respect to the alleged assaults and batteries, to disprove the libellant's right to wages; and, on that, the main *gravamen* of the suit, the decision of the Court is in favor of the libellant, who, on the coming in and confirmation of the clerk's report, will receive his costs, after making the deduction indicated, together with the amount of his wages, and of his damages from the loss of his property on board of the ship.

Decree accordingly.

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A bill of lading is a contract maritime in its character, and within the jurisdiction of Courts of Admiralty, whether it be made on land or on the high seas.

The owner of goods which are shipped and are not delivered according to the bill of lading, has a lien upon the vessel, for the value of the goods, which may be enforced in Admiralty by an action *in rem*.

The owner of cargo, part of which is sold by the master to raise money for the necessary repairs of the vessel, and part of which is consumed by the crew

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and passengers on the voyage, has a lien on the vessel for the value of what is so sold and consumed.

Owners of ships which are employed in transporting goods for hire, are common carriers.

Depredations on a ship's stores or on her cargo, committed by her passengers or crew, in consequence of a short allowance made necessary by the length of a voyage, is not a peril of the sea, within the meaning of a bill of lading. Where a libel is brought for the non-delivery of goods according to a bill of lading, the measure of damages is the current value of the goods at the port of destination at the time when the goods ought to have been delivered, with interest from that time.

October 19th, 1832.

THIS was a libel *in rem*, setting forth that the libellant had shipped at Havre, on board the ship Gold Hunter, 6,084 bottles of wine, consigned to his agent in New-York; that 58 baskets of the wine mentioned in the bill of lading, of the value of \$600, had not been delivered; and that, of the wines so missing, a portion was sold at Halifax, where the ship put in, in distress, to raise money for her necessary repairs during her homeward passage, and the rest was embezzled and consumed by the passengers, who were permitted, on their arrival in New-York, to leave the ship with their baggage and effects. The claim was for the value of the wines. The answer of the owners of the vessel, one of whom was the master, excepted to the jurisdiction of the Court, alleging that the cause of action, if any existed, arose only upon a bill of lading made at Havre, in France, and not upon the high seas. It also denied the existence of any lien upon the vessel for the demand. It appeared in evidence, as to the wines alleged to have been embezzled, that it became necessary, during the voyage, to put all on board on short allowance; that the passengers were, in consequence, almost in a state of mutiny; and that the master and crew were unable to restrain them from using a portion

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of the wines of the libellant. Of the wines sold at Halifax, some sold for more and some for less than the current value of the same wines in New-York.

Francis B. Cutting, for the libellant.

William Emerson, for the claimants. I. The term "Admiralty and maritime jurisdiction" in the Constitution, and in the judiciary act, signifies, that jurisdiction which was exercised by the Admiralty Courts of England at the time of the Declaration of Independence. The jurisdiction exercised in the United States at the time of the Revolution, cannot be taken as the standard, since it was too loose and extensive, besides being uncertain and varying in different parts of the country; nor can the jurisdiction exercised in England at the time of the emigration to this country, since the emigration took place at no one fixed time, and it would be equally uncertain with the other. The extensive jurisdiction of the Admiralty, in derogation of the trial by jury, was one of the sources of complaint at the time of the Revolution. The terms "Admiralty" and "maritime" are synonymous, and do not operate to enlarge or affect each other. Where Admiralty jurisdiction exists, it is made exclusive in the Courts of the United States, by act of Congress; and, therefore, the uniform course of decisions in the State Courts upon bills of lading, must be overthrown, if the subject matter is one of Admiralty cognizance. At the time of the Declaration of American Independence, the English Courts of Admiralty had no jurisdiction over bills of lading. II. Under the circumstances of this case, no lien

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arose. There was no possession, which is necessary to sustain a common law lien, and no express instrument of hypothecation, and the vessel is discharged, even if a personal liability of the master or owners is shown.

BETTS, J.—The point raised, in this case, as to the jurisdiction of the Court, is to be determined by the consideration, whether the subject matter of the suit is of a maritime character. Subjects of a maritime nature, which pertain to the cognizance of Courts of Admiralty, are those touching things done upon, or in relation to the sea; in other words, all transactions and proceedings relative to commerce and navigation, and to damages and injuries done upon the sea. Charter-parties and contracts of affreightment are appropriately considered as within the scope of those powers, and jurisdiction is exercised by Admiralty Courts over those classes of cases. Policies of insurance and bills of lading are regarded as included within the same principle. (*De Lovio v. Boit*, 2 Gall. 398; *Drinkwater v. The Spartan*, Am. Jur. No. 5, p. 26, Jan. 1830.¹)

It is not denied that subjects of the character of the one involved in this action were, at an early period, within the ordinary jurisdiction of the English Admiralty. It is supposed, however, that the jurisdiction has, to that extent, been abrogated or restrained by the adjudications of Courts of common law, from a period anterior to our Revolution. (*Johnson, J., in Ramsay v. Allegre*, 12 Wheat. 621.) Although the common law decisions in England, and the prohibitions which followed

¹ Reported in *Ward's R.* 149.

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them, may have suspended or abolished the ancient powers of the Admiralty, that fact does not necessarily determine the limits of the jurisdiction under the jurisprudence of the United States. The signification of the phraseology employed in our Constitution is not determined by the sense in which the same expressions were used in the English jurisprudence, except as to those terms which had a notorious common law meaning. Those terms which are derived from the civil law, or are expressive of the functions of Courts acting under that system, are expounded upon the general principles which govern the interpretation of language, or by historical evidence of the mode in which the same terms were ordinarily employed in the administration of that system. In view of the American authorities on this subject, it cannot be an open question with this Court, whether Admiralty jurisdiction is to be ascertained by consulting the expositions given by the common law Courts of England, or by allowing fair force to the provisions of the Constitution and laws of the United States, in connection with the doctrines and administration of the Courts of other civil and maritime powers. The Admiralty jurisdiction, in respect to contracts, depends upon their subject matter. (*De Lovio v. Boit*, 2 Gall. 398; 2 *Browne's Civ. and Adm. Law*, ed. 1799, 150, 169.) A bill of lading clearly possesses the characteristics of a maritime contract. It concerns transportation by sea, and the whole service and consideration contemplated by the parties to it, relate to navigation and to maritime employment. The transaction covered by it is one of navigation and commerce on navigable waters—in this case, upon the high seas. The contract is, then, in its essence

and nature, maritime, and is subject to the cognizance of this Court, whether entered into on land or on water. (*The Rebecca*, *Am. Jur.* No. 11, p. 1, *July*, 1831.¹) The exception to the jurisdiction is, therefore, overruled.

The questions which remain relate to the measure and mode of relief applicable to the facts, and to the competency of a Court of Admiralty to administer it. Two principles have an important bearing on the subject, one of which principles rests in the doctrine of the common law, and the other is drawn from the commercial and maritime codes. The first is not open to contestation, and is, that the owner of a general ship is chargeable with the responsibility of a common carrier for goods transported at sea. (2 *Kent's Comm.* 608, 609; *Story on Bail.* §§ 496, 501; *Allen v. Sewall*, 2 *Wend.* 327.) The other proposition—that the ship is responsible to the shipper, on the undertaking of the master in the bill of lading, for cargo laden on board—is less familiar in the adjudications of the Courts, but may now be affirmed to be solidly imbedded in the elements of commercial law. (*Cons. del Mare*, chs. 104, 105, 106; *Molloy*, b. 2, ch. 3, § 9; *Abbott on Shipp.* ed. 1829, 94, 170; *The Ship Packet*, 3 *Mason*, 261; 2 *Browne's Civ. and Adm. Law*, ed. 1799, 156; 3 *Kent's Comm.* 220.) It is becoming an equally familiar principle in this country, that a contract of affreightment is within the Admiralty jurisdiction, and that a remedy *in rem*, against the ship, will be afforded in that Court for a default of the master in performing the contract.

¹ Reported in *Ware's R.* 188.

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(*Bulgin v. The Ship Rainbow*, *Bee's R.* 116; *De Lovio v. Boit*, 2 *Gall.* 398; *The Jerusalem*, *Id.* 348; *Zane v. The Brig President*, 4 *Wash. C. C. R.* 453; *Drinkwater v. The Spartan*,¹ *Am. Jur.* No. 5, p. 26, Jan. 1830; *Crane v. The Rebecca*,² *Id.* No. 11, p. 1, July, 1831.) The subject-matter of the contract concerns the navigation of the seas, and affects the ship, her freight and cargo. The lading, transportation and unloading are sea services, and the engagement in the bill of lading, for the performance of those services, is of a maritime character, and imparts a lien, and binds the ship to the performance. (*The General Smith*, 4 *Wheat.* 443; *The Jerusalem*, 2 *Gall.* 349; *Molloy, b.* 2, ch. 3, § 9; *Cons. del Mare*, chs. 105, 106; 2 *Browne's Civ. and Adm. Law*, ed. 1799, ch. 5.) The lien thus secured is appropriately enforced by process *in rem*, in Admiralty.

Satisfaction is sought, in this action, for the loss of cargo, occasioned by the plunder and consumption of some of the wines on the passage from Havre to Halifax, the port of distress, and also for the portion disposed of by the master at Halifax, to obtain funds for the necessary refitment of the ship. The necessity for the repairs is not questioned, nor is it contended that the master had any resources for their supply in that port, other than the cargo. Under such circumstances, the law justifies the master in appropriating so much of the cargo as may be required for the necessities of the voyage. (*Cons. del Mare*, chs. 105, 106; *Laws of Oleron*, art. 22; *Laws of Wisbuy*, arts. 35, 45; *The Gratitude*, 3 *Rob.* 240.) Our maritime Courts hold

¹ *Ward's R.* 149.

² *Id.* 188.

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that, in such case, the ship is responsible to the owner of the goods, and that a lien for their value arises, which can be enforced *in rem*, against the ship. The cases of *The Rainbow*, (*Bee's R.* 116,) and of *The Ship Packet*, (3 *Mason*, 261,) support this proposition. (See, also, 3 *Kent's Comm.* 220.) A distinction may be attempted to be drawn between an appropriation of the cargo, in aid of the ship, by the voluntary act of the master, after her arrival in a port of safety, and a mere failure or neglect to deliver it to the consignee; as the former is an incident of the perils of the sea, and might, perhaps, fall within the exceptions in the bill of lading, against responsibility for losses by those perils. I am inclined, however, to follow the American authorities on this subject; because, although a peril of the sea produced the necessity for the repairs which were made, and thus indirectly led to the use of the libellant's property for the benefit of the ship, yet such peril was not the proximate cause of the loss of the goods. They were disposed of at the option and selection of the master, to raise funds in aid of the voyage, which was interrupted or delayed by such peril. In that view, I think the broad principle would aptly apply, that the ship is answerable for the safe carriage of the goods, and for their delivery to the consignee, even without the aid of the further principle, that the act of the master, in so appropriating the goods for the service of the ship, creates a charge on the ship for their value. The equity of the first mentioned rule is manifest; for the foreign shipper trusts to the ship, as an open letter of credit from her owners, and furnishes supplies on that authority alone, since, ordinarily, he can know nothing of the personal responsibility of the owners.

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The same principle covers equally the wines sold by the master in Halifax, and those consumed on the passage by the passengers and crew. Those depredations constitute no excuse to the owners, for the non-fulfilment of their contract of carriage; (*Abbott on Shipp.* 222; 2 *Kent's Comm.* 609; *Morse v. Slue*, 1 *Vent.* 190, 238; *Schieffelin v. Harvey*, 6 *Johns.* 170;) and the value of the property so lost is a charge on the vessel. (*Cons. del Mare*, *chs.* 209, 212; 2 *Molloy*, *b.* 2, *ch.* 3; *American Ins. Co. v. Coster*, 3 *Paige*, 323; *Ross v. The Ship Active*, 2 *Wash. C. C. R.* 226.) I shall, accordingly, decree to the libellant the value of the deficiency in his shipment, with costs.

The goods having been deliverable here, and only a part of them having been brought to their port of destination, the libellant is entitled, in reimbursement of the deficiency, to recover the market value, at this port, of the goods lost, with interest. That seems to be the measure of damages for deficiency of cargo, except, perhaps, in cases of average adjustment; (*Watkinson v. Laughton*, 8 *Johns.* 164;) and interest is an equitable remuneration to the owner for being deprived of the use of his capital, after the ship was bound to put it in his possession. Neither the price brought by the wines sold at Halifax, nor their invoice cost, nor their value at the place of shipment, furnish the rate of compensation under the contract of affreightment.

An order must be entered, referring it to the clerk to ascertain the value of the goods, under these directions, and also to ascertain, the freight, prime and other necessary charges due from the libellant to the ship; and, if a balance is found due to the libellant, process for its recovery may be awarded at his instance.

The Boston.

THE BOSTON.

An objection to the competency of an administrator to appear as claimant in a suit *in rem*, must be taken on his appearance, and before sale of the property and payment of the proceeds into Court.

An administrator appointed in another state, who has not taken out letters within the jurisdiction of this Court, may intervene in behalf of his intestate, in a suit *in rem* in this Court against a vessel which was the property of the intestate at his death.

In this country, no formalities are necessary to the due appointment of a ship-master. The registry acts of the United States in regard to vessels and their masters, are only designed for the protection of the revenue, and do not affect the validity of a master's authority.

Where, upon the death of the master and sole owner of a ship during a voyage, the mate took command, and his name was substituted in the ship's register for that of the former master, and he navigated her for a year, without objection, and with the knowledge of the widow and children and agent of the former master: *Held*, that his acts done in the capacity of master were valid as against the representative of the deceased owner.

The lender upon bottomry is bound to ascertain that the money is necessary for the particular voyage, as well as that the master has no other resources on hand.

It seems that the lien of a material man is assignable.

Ordinarily, the lien of a material man will not be upheld beyond the termination of the voyage for which the supplies are furnished.

Parties who could not sustain an original action *in rem*, may, sometimes, on petition, be paid out of a surplus remaining in Court.

This is usually done in cases where the fund would otherwise be paid over to a foreign owner and domestic creditors would be left to a merely personal remedy, against such owner, before a foreign tribunal.

Freighters, whose goods are disposed of at a foreign port to raise money for necessary repairs, have a lien upon the vessel for the value of the goods at the port of destination.

October 19th, 1832.

THE first libel in this case was filed, *in rem*, by William Morrison, to enforce a bottomry bond executed to him in Glasgow, in Scotland, on the 3d of November, 1831, by Henry Upton, as master of the ship Boston, an American vessel. In February, 1831, Oliver P.

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Finlay, at that time master and sole owner of the Boston, died while his ship was on a voyage from Greenock, in Scotland, to Charleston, in South Carolina, and Henry Upton, then chief mate, took command, and carried the vessel into the latter port. He there gave her up to the confidential agent of Finlay, who was also consignee, and was continued by him in command. Upton's name was entered as master in the ship's register, and he was sent back with her to Greenock. The family of Finlay were, at that time, in Greenock, though his domicil, at the time of his death, was at Alexandria, in the District of Columbia. Finlay's family made no objection to the appointment of Upton, as master, and returned with him in the vessel to this country. On the 3d of October, 1831, William D. Nutt, the claimant in these actions, was appointed, at Alexandria, administrator of Finlay, but took out letters of administration at no other place. On the 3d of November, 1831, the Boston being then at Greenock, Upton bottomed her to Morrison, the libellant, as security for a sum of money advanced by him. Morrison, who knew the circumstances under which Upton got possession of the ship, and was advised by counsel that his power to bottom her was clear, purchased the claims of McLelland & Co., creditors of the vessel, for debts incurred by her upon her previous voyage, and for which those creditors threatened to arrest her. None of those debts were incurred for the necessities of the ship for the voyage to which the bottomry referred. One of them was for materials furnished for the necessary equipment of the vessel upon her preceding voyage.

To this libel two defences were interposed. The

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first was the claim and answer of Nutt, as administrator of Finlay, denying the authority of Upton, as master of the Boston, to execute a bottomry bond. The other was the answer of Dixon & Co. and others, the libellants in the second suit, asserting the authority of Upton as master, but denying the validity of the bond executed by him to Morrison.

The second libel was filed by Dixon & Co., Mitchell & Co. and Pattison & Duncan, merchants and owners of parts of the cargo of the Boston, which were sold by Upton, in Charleston, for the necessary repairs of the vessel. It appeared that, on the 7th of November, 1831, the Boston sailed from Greenock for New-York, but was compelled to put into Charleston for repairs, and that, in order to raise there the necessary money, the master was obliged to sell part of the cargo, being goods, the property of the libellants, who claimed \$3,819 18, which was the value at New-York of the goods thus sold. To this libel the other parties interposed claims and answers.

The Boston arrived in New-York on the 14th of February, 1832, and, in the following month, the above libels were filed. The vessel was subsequently sold, and the proceeds brought into Court to await the determination of the claims.

David B. Ogden and Richard M. Blatchford, for Morrison.

Daniel Lord, jr., for Pattison & Duncan.

John Duer, for Dixon & Co. and Mitchell & Co.

Seth P. Staples, for Nutt.

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BETTS, J.—The right of Nutt, the claimant, to intervene, is contested by the libellants in both causes, because he received his appointment as administrator from a foreign jurisdiction, and did not acquire thereby a *persona standi* in this Court. It might be sufficient to say, in answer to this objection, that the suits being *in rem*, and the vessel having been sold and the proceeds brought into Court, the libellants must satisfy the Court affirmatively of their right to withdraw the funds, before they will be decreed in satisfaction of the suits, whatever may be the legal rights of the claimant thereto. Had the objection been raised when the claimant first entered an appearance, the Court would have been bound to determine his competency to contest the suits. If that decision had been adverse to him, the only consequence would have been a change of parties to the record, or a decree of condemnation and sale of the vessel as by default, and the deposit of the proceeds in Court; and, when the libellants sought satisfaction out of the proceeds, the Court would, at the mere suggestion of any party showing a slight color of interest, have required evidence of their title, beyond the defaults, before the moneys would have been paid to them. If, then, the foreign administration with which the claimant is clothed, is not deemed sufficient authority for him to interfere with and control the progress of the suits, it would entitle him to intervene as a petitioner, praying that the funds in Court may be reserved for the legal representatives of the owner of the vessel, and to put in question the right of the libellants to receive them. The Court would feel no difficulty in allowing an administrator, who received his appointment at the place of the owner's domicile, to inter-

fere thus far with respect to proceedings against a vessel not arrested at her home port, and in granting all necessary indulgence to enable the estate to become formally represented in the action. But I am not aware of any benefit a new arrangement of parties would afford. The objection is merely technical, and, if sustained, the only consequence will be an order to reform the pleadings, by substituting an administrator with a New-York appointment. The case is now fully before the Court, and a longer delay does not promise advantage to any party. I am disposed to admit the intervention of the foreign administrator to have been proper, at least in so far as his acts may be regarded as invoking the Court to retain the funds until the libellants give full evidence of their right to them.

There is less reason to notice objections to the capacity of the administrator to make himself a party to the suits, because, it being yet doubtful whether the fund in Court is adequate to the demands of both suits, the libellants stand as antagonist suitors with respect to each other, as well as to the administrator. They have not only impliedly waived their right to object to the claimant's making himself a party, by admitting him to appear and answer, and propounding to him interrogatories and reading his replies; but each interposes a claim and defence in opposition to the particular demand of the other, as respects its right to priority. The Court must accordingly, on these issues, determine the rights of the libellants in both suits to a lien on the ship, even if no intervention is made on the part of Captain Finlay's estate, and it may, therefore, be of no immediate moment in the cause, whether the cumulative objections of the administrator are admitted or not.

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But the question may become one of moment in the practice of Admiralty Courts, which are largely concerned in disposing of vessels and their proceeds, on demands arising, as in the present cases, beyond their local jurisdiction, prosecuted by foreign creditors, and where the vessels and their proceeds are claimed by owners resident abroad. And, as, from the magnitude of the present demands, the judgment of higher tribunals will probably be invoked in these cases, I think it proper to decide the point, and suggest some of the considerations upon which the decision is founded, in order that an authoritative rule on the subject may be declared by the Courts of appeal.

Courts proceeding according to the course of the common law in this country and in England, disregard, as a general principle, letters of administration emanating from foreign tribunals, and require the representative of a deceased party, so authorized, to procure letters within the jurisdiction where the Court sits. (*Goodwin v. Jones*, 3 *Mass.* 514.) There are exceptions to this rule in the practice of particular States. (*McCullough v. Young*, 1 *Binney*, 63; *Glassell's Adm. v. Wilson's Adm.* 4 *Wash. C. C. R.* 59; *Childress v. Emory*, 8 *Wheat.* 642.) But it is not important, on this occasion, to investigate the extent of the diversity, or the grounds upon which it rests.

Two principles, it is believed, are common to the jurisprudence of all common law Courts—that the administrator has the legal title to the personal assets of his intestate, until final distribution of them is made, (*Bac. Ab. Executors and Administrators*, H. 1; 2 *Black. Comm.* 494; *Toller on Ex.* 80; 2 *Griffith's Law Register*, 352,) and that the ownership and distribution

conform to the law of the domicile of the deceased, without regard to the law of the place of his death, or the *situs* of his property. (*Toller on Ex.* 133; *Com. Dig. Adm. B.* 11; *Harvey v. Richards*, 1 *Mason*, 408.) This title is not an absolute property in the administrator, but it clothes him with the right of possession and control of the property, until the satisfaction of debts and legacies, as completely as if he were its proprietor. (*Slack v. Walcott*, 3 *Mason*, 512.) Under that title, he may undoubtedly take possession of assets in a foreign country, when not prevented by the local law; (*Commonwealth v. Griffith*, 2 *Pick.* 11, 14;) and a voluntary payment of a debt to him, by a foreign debtor, seems to be an acquittance of such foreign debtor. (*Doolittle v. Lewis*, 7 *Johns. Ch. R.* 49; *Stevens v. Gaylord*, 11 *Mass.* 256. See *Dawes v. Head*, 3 *Pick.* 128; *Davis v. Estey*, 8 *Id.* 475.) The impediment to the exercise of the full powers of an administrator, in a jurisdiction foreign to that granting him letters of administration, seems, then, to be the technical objection of the law Courts, to his reception on the record as a party. That the incapacity is essentially technical and formal, is manifest, because, the party clothed with administration at the place where the intestate died, is admitted, of course, to administration, where the property of the decedent is found. The latter administration is not even claimed to be an original authorization of representation, but is regarded as only ancillary to that. (*Harvey v. Richards*, 1 *Mason*, 381; *Stevens v. Gaylord*, 11 *Mass.* 256; *Davis v. Estey*, 8 *Pick.* 475.) A cardinal principle, in which the practice of Admiralty Courts differs from that of Courts of common law, is, that parties prosecute and defend,

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in the civil law tribunals, upon their rights as existing at the institution of the action, without regard to the state of parties when the right of action or defence accrued, rights of action, or choses in action, as they are termed at law, vesting in their assignee, when properly transferred, all the privileges and remedies possessed by their assignor. Accordingly, the party in whom a debt is legally vested, sues for it in his own name, the same as if it were a chattel. The ordinary course of practice would, therefore, well admit a foreign administrator to represent the interest of his intestate in an Admiralty Court, without the aid of an ancillary commission from the local authorities; and, had the present action been in progress, *in personam*, against the decedent, I should not feel required to hold his representative, commissioned at the place of his domicil, as disqualified from intervening under his Virginia appointment, answering the libels and contesting the suits in that capacity, when such suits might, in their result, operate as a charge on the assets of the estate. The present proceedings are *in rem*, and, for the time being, hold the vessel in arrest, and in effect appropriate it to the demands in suit. The fruit of the actions is, to sequester the effects of the intestate, and place them at the disposal of the Court. They cannot, therefore, be withdrawn from that custody by the creditors, or by any other party, until the Court is satisfied they are applied conformably to the rights of all parties interested in them. The very purpose sought to be attained by the law Courts, in requiring an administrator to sue within the jurisdiction which has conferred his authority upon him, is answered in an Admiralty Court

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by its established course of procedure ; for, notice of the widest notoriety is given, by arrest of the property, to all persons concerned, to make their claims against it, and the property is retained in the custody of the law until the relative rights of creditors are made known and adjusted, which is all, if not more, than can be attained, in Courts of law, by force of an administration bond. It is not to be supposed that an administrator could be made liable upon his bond to one class of creditors, for assets allotted to other creditors by the decree of a Court of Admiralty proceeding against the property in a suit within its jurisdiction. The claimant is thus, manifestly, the real party in interest in this controversy, the law vesting in him the title to the ship, and imposing upon him the duty of protecting it for the benefit of the estate he represents. Accordingly, he is to be directly affected by the decision of the litigation, in whatever way that interest may be represented in Court ; and I am disposed to allow him to come into Court directly, under the capacity and right imparted to him by his letters of administration, without requiring him to subrogate another functionary to perform the same offices, and to the same end. As the law of a decedent's domicile is looked to, to ascertain who succeeds him in the enjoyment and possession of his property, there seems to be a marked propriety in equally noticing who, by the same law, would be the appropriate party to dispose of or reclaim such property. And, particularly, claims in relation to vessels employed in navigation, which, in their normal state of transition, can scarcely be regarded as having any *situs*, within the acceptance of the law, other than, figuratively, that of the resi-

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dence of their owners, should, in Admiralty and maritime Courts, which are, in a great degree, governed by the *lex gentium*, be pursued or defended in the names of the persons who, by their domicil, have title to the vessels.

I think, then, that on general principles, the claimant has an adequate *persona standi in judicio*, to intervene in these causes, for the protection of his intestate's estate, and to contest both the validity of the demands brought against the ship, and all claims upon the proceeds in Court. Independently of the objection, that the libellants are too late in taking exception to the competency of the claimant, I overrule the exception, on the ground that a foreign administrator is admissible in proceedings *in rem*, in Admiralty, upon his legal title in the property, to contest any suit against it.

The interposition of the administrator varies the issues between the libellants in only one particular of importance. The libellants in each action, in their answer to the rival suit of the others, admit full authority in Upton, as master of the ship, to do the acts set up as constituting the respective liens articulated upon, other than that Mitchell & Co. deny that the instrument set up by Morrison is a bottomry bond, entitled to priority of satisfaction over their demand. The administrator, on the contrary, denies that Upton was lawful master of the ship, and that either debt is so created as to become chargeable upon the vessel.

The questions, then, which are raised by the pleadings, are, whether the bottomry bond sought to be enforced in the first action, and the demands set up in the second, are liens upon the vessel; and, if both are

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so, which has priority of privilege. It is necessary, in the first place, to ascertain what authority Upton possessed, as master, either to bottom the ship, or to sell part of the cargo. For either of these acts, two things must be shown—a valid appointment as master, and that the act was within the scope of the authority conferred.

In some maritime countries on the continent, the mode of a master's appointment is prescribed by law. (*Jacobsen's Sea Laws*, 83, 85, 87.) In this country and in England, the law does not interfere in relation to the qualifications or mode of appointment of a master, further than as regards his national character. He is, *pro hac vice*, the agent of the owner; and any mode of authorization competent to give power to one man to act for and bind another, is sufficient to constitute him master of a ship. The registry act of the United States requires that the name of the master shall be inserted in the register of the vessel; (*Act of December 31st*, 1792, § 9, 1 *U. S. Stat. at Large*, 291;) that, on a change of ownership, a new register shall be taken out; (*Id.* § 14, *Id.* 294;) and that, when the master is changed, the register shall be produced to the collector, and a report be made to him, by the owner, or the new master, of such change, whereupon the collector shall endorse a memorandum of the change on the register, and subscribe his name thereto. (*Id.* § 15, *Id.* 295.) None of these provisions, however, whether complied with or not, affect the validity of the master's authority. They are only designed to secure the revenue against the allowance, to foreign vessels, of privileges which only vessels belonging to citizens of the United States are entitled to enjoy. The provision,

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that a change of master may be reported to the collector by the new master alone, abundantly shows, that Congress did not intend that the collector should make any inquiry into the legality or sufficiency of the master's authority. His legal appointment is assumed, upon his producing the ship's register, and he is, accordingly, registered as the master.

In the case before the Court, the collector and naval officer of Charleston, on the 14th of March, 1831, endorsed on the ship's register the substitution of Upton, as master, in place of the late master, Finlay. That the authority of Upton, as master, was complete as to all persons dealing with him without notice of the manner in which he acquired command of the vessel, can scarcely admit of argument. He sailed the vessel between the United States and Europe, from March, 1831, to February, 1832, performing all the offices, and exercising openly the powers of master; and, although the manner in which he continued in the command of the vessel, after her arrival in the United States, was peculiar, and without the direct authorization of a legal owner, yet, as such possession continued openly and notoriously for six or eight months, and the vessel made repeated voyages, earning large sums of money from freights and passengers, which were disbursed by Upton, in this country, with the knowledge of those most directly interested in the vessel, it is too late for them now to disavow and repudiate his acts, because of the want of a regular appointment. They must be held to have acquiesced in the authority he assumed, and, by such ratification, to have given to it all the validity it would have derived from the most direct and formal appointment. (*The Alexander*, 1

Dods. 278.) At least, it would be most hazardous to trade, and unjust towards all persons putting confidence in a state of things conformable, in all respects, to ordinary usage, to hold that foreign creditors were bound to run the hazard, in their dealings with Upton, of proving that he originally acquired command of the vessel from the legal owner, and by positive appointment. It is enough for them to show that he was in possession of her, under such circumstances as fairly proved that her owners must know the fact; and the necessary authority for his acts, as master, will then be implied by law.

These considerations establish the right of the libellants in the second suit to look to the vessel or her owners for the performance of the contract of affreightment made with them by Upton. It is contended, however, that, since Morrison knew how Upton came into possession of the vessel, he was bound to acquaint himself with the manner in which he obtained the authority of master, which he subsequently assumed to exercise. There can be no question of the *bona fides* of dealing with a master of a ship, in a foreign port, in the usual course of business, under circumstances like those which existed in this case; nor can the legal competency of such a master to hypothecate the vessel to a *bona fide* creditor be doubted. (*The Alexander*, 1 *Dods.* 278; *The Tartar*, 1 *Hagg.* 1.) Even if Morrison is to be presumed to have been cognizant of all the facts connected with Upton's possession of the vessel, I should feel no hesitation in declaring that such possession was rightful, and that all parties interested in the vessel or her cargo were bound by the acts of Upton, in the capacity of master, as long as he was not

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regularly displaced by the legal owner. He took command on the death of the former master, at sea. The law devolved it upon him as chief mate. (*The Favorite*, 2 *Rob.* 232.) On the arrival of the vessel at her port of discharge, she and her cargo were placed in charge of the consignee and confidential agent of the former master, who supplied her with freight, and, continuing Upton in command, despatched her to Greenock, having had Upton's name entered in the register as master. His authority to appoint a master in case of necessity is fully supported by the authorities. (*The Alexander*, 1 *Dods.* 278; *The Tartar*, 1 *Hagg.* 1.) Finlay was sole owner of the *Boston*, and, as she was an American vessel, the law of the District of Columbia, the place of his domicile, would, at home and abroad, determine the right of succession after his death. (2 *Kent's Comm.* 429.) The law of Virginia prevails at Alexandria, his place of residence, and is substantially the same as that of England with regard to the distribution of intestates' estates—one-third to the widow and two-thirds to the children. (2 *Griffith's Law Reg.* 352.) Although foreign creditors were bound to notice the law of this country, by which the property in the vessel vested, in the first instance, in the administrator of Finlay, yet they are also to have the benefit of the further notice, that such administration belonged, of right, to the widow, and that, whenever she assumed it, she thereby became so fully clothed with power in relation to the vessel as to be able to ratify any antecedent dealings in respect to it. Foreign creditors might thus be regarded as having transacted business with Upton with her sanction, under the persuasion that she would assume the character of administratrix on arriving in

the United States, and thus qualify herself to carry out fully what the law left at her own option to do. She did not, in fact, exercise her right, but allowed the claimant to take out letters of administration. He was duly appointed on the 3d of October, 1831, one month previous to the sailing of the ship on her last voyage, and there is no evidence that he at any time interfered with the authority of Upton, to disavow or control it. As, by the ancient civil law, the heir is considered as being substituted in place of the deceased, and as taking all his rights and responsibilities in such manner as to maintain a perpetuity and entirety, without succession, with respect to the estate, so the administrator is regarded as continuing in himself all the rights and powers of the owner, until his trust is fulfilled by the satisfaction of all debts and a final distribution of the assets. The foreign creditor had a right to presume, either that the right of property was in the widow, in the capacity of administratrix, by intendment of law, so that her acquiescence in the command of Upton would amount to a competent ratification of it, or that the law had supplied a sufficient representative in her place; or he might be authorized to infer a distribution of the estate to the widow and children, so that the confirmation of Upton's authority might be implied from their permitting it to continue. The *bona fides* of the transaction is further shown by the fact, that advice was taken of counsel. Under all these circumstances, I can feel no hesitation in declaring the competency of the master to hypothecate the vessel in a case justifying a bottomry loan.

But it is contended, that the giving of a bottomry bond was not authorized by the circumstances of the

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case. An objection applying to the whole claim included in the bond is, that no part of it was advanced to the ship in aid of the voyage she was about to perform. The libellant was bound to ascertain, before he accepted a hypothecation, whether the necessities of the ship demanded the advances for her equipment for the particular voyage, and whether or not the master had other resources, in the port where the vessel then was, for supplying those necessities. (3 *Kent's Comm.* 171.) Neither of these essential facts being made to appear, I am bound to declare the bottomry unauthorized and void at law. (3 *Kent's Comm.* 171, 172; *Abbott on Shipp. ed.* 1829, 124 n.) The bottomry holder doubtless acted in good faith, and made the loan under the persuasion that a threatened arrest of the ship for prior debts would uphold the bond equally as if the loan had been made to relieve her from actual seizure. This, however, is not the law. The pre-eminent security of bottomry, with its high privileges, is sanctioned only when a ship is under positive arrest, and cannot take effect when the money is advanced only to avert a menaced arrest. (*The Aurora*, 1 *Wheat.* 105.) I attach no importance to the fact that insurance was effected by the bottomry holder on the vessel, as he might, perhaps, be considered as having obtained that for the benefit of the owner, and not for his own security.

The question now arises, whether Morrison has, as assignee, the privilege of a material man, for that portion of the debt which arose from advances made for repairs and necessities furnished to the vessel on her preceding voyage, so that he can enforce that privilege in the Admiralty Courts of this country. If the right of

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lien was a continuing one in his assignors, McLelland & Co., I perceive no objection to its continuance in the libellant, who took an assignment of the debt for a full consideration, at the express instance of the master, and would accordingly be entitled to the legal remedies for its recovery which were possessed by the original creditors. It is unimportant whether the general rule of maritime law obtains in Scotland, that repairs and necessaries form a lien on the ship herself, so that the material men could have enforced their claims against the foreign vessel, by an attachment of her there, because, the remedy will be afforded in conformity to the law of this country, and not to that of the country where the debt accrued. The question is, whether McLelland & Co., the assignors of the libellant, were possessed of a lien. McLelland & Co., having lent money to be employed in the repair of the vessel, and under circumstances reasonably importing that credit was given to the ship in that respect, were, by the rule of the civil law, entitled to a priority of payment out of the ship herself, without any express contract to that effect. (*Abbott on Shipp. ed. 1829, 108; American Ins. Co. v. Coster, 3 Paige, 323.*) Has this right been lost by their having permitted the vessel to leave Scotland, or by lapse of time? By the law of England, the shipwright or material man has a lien on a vessel for necessaries, &c., furnished at home, only so long as she continues in his possession. He may retain possession until he is paid, but, if he parts with possession, or furnishes supplies without taking possession, he cannot enforce a claim upon the vessel herself, as a privileged creditor, (*Abbott on Shipp. 109,*) the Courts of that country regarding a lien only in its meaning and appli-

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cation under the common law. Notwithstanding the opinion of an eminent Scotch writer, (1 *Bell's Comm.* 527,) that a vessel would, under such circumstances, be liable to attachment for such debt in Scotland, there is great reason to question the accuracy of that statement. Clearly, she would not have been liable in England, without an express hypothecation of her, and it is plain, from both *Abbott* and *Bell*, that the House of Lords and the highest Courts in Scotland are disposed to maintain the same rule of law in this respect in both countries. The English Court of Admiralty takes cognizance *in rem* of the lien, when the debt accrued abroad, only in cases where the vessel is expressly hypothecated to secure it. (*Abbott on Shipp. ed.* 1829, 108, 116.) Probably, the acknowledgment of the demand in the bottomry bond, might be deemed, in England, a sufficient hypothecation of the vessel to bind her, for the satisfaction of the debt, to the libellant, as assignee of the creditors who advanced money for supplies, although that bond may be void as a contract of bottomry, reserving a maritime interest. In our Courts, the privilege or remedy acquires no additional force from an express pledge of the vessel. Still, the law recognises the validity of such hypothecation. (*Abbott on Shipp.* 125, 126, *note*; *The William and Emmeline, ante*, p. 66.) But these specific liens, when recognised and allowed, are not interminable. The creditor, if not limited to the first opportunity for enforcing his remedy upon them, must pursue that remedy with due diligence. Even a bottomry bond becomes void by an omission to enforce it in a reasonable time. (*Abbott on Shipp.* 131; *Blaine v. The Ship Carter*, 4 *Cranch*, 328.) But there is no express limit-

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ation of time declared by the law, within which an action on a bottomry bond must be brought; (*Hall's Emerigon*, ch. 9, § 3;) and, as the implied privilege has all the efficacy of an express one, it would, by analogy, partake of the same properties in respect to the time in which it might be enforced. Still, as the value of the security by hypothecation consists in the priority of right it confers, whatever destroys such priority, would necessarily reduce the subject of demand to the state of ordinary indebtedness. The lien which supplies a foundation for the proceeding *in rem* being superseded, no other remedy can be afforded by this Court than that which could be commanded on any contract of a maritime character. In the opinion of the Supreme Court, the priority of a bottomry creditor cannot extend further than the voyage upon which the loan was made. (*Blaine v. The Ship Carter*, 4 *Cranch*, 332.) There is a manifest propriety in holding tacit liens to restrictions no less guarded. (*American Ins. Co. v. Coster*, 3 *Paige*, 323.) This Court has not required that they should, in all cases, be set up before the vessel leaves the port of refitment, for that would not unfrequently destroy the whole benefit of the advance. The Court would, however, require very strong proof, before it would allow a lien to be upheld beyond the close of the voyage then in progress. (*The Utility*, *ante*, p. 218.) Ordinarily, if the vessel were suffered to leave the place of refitment, the presumption would be, that other security than that of the vessel was looked to by the material man, and the lien would not be sustained without evidence counteracting that presumption. (*Zane v. The Brig President*, 4 *Wash. O. C. R.* 453.) Upon that princi-

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ple, this demand in behalf of McLelland & Co. for advances made to supply and refit the ship, would have lost its right of privilege on the return of the vessel to Greenock, and would not be enforced there against the ship by attachment, nor here afterwards upon its original merits, or by force of the hypothecation made to the libellant at Glasgow. (*American Ins. Co. v. Coster*, 3 *Paige*, 323.)

But, the vessel having been sold, and the proceeds being in Court, this demand, which was originally privileged, and is clearly within the cognizance of the Court, may, under certain circumstances, and on petition of the party, be satisfied out of the fund in Court, though it could not be made the ground of an original suit. (*Zane v. The Brig President*, 4 *Wash. C. C. R.* 453 ; *The Stephen Allen*, *ante*, p. 175 ; *The John*, 3 *Rob.* 288.) Having been, to a certain extent, privileged in its inception, it lost the right of being levied upon the vessel itself, by means of an implied waiver of the lien. Still, as against foreign owners, it would have been recognised in the English Admiralty as an equity entitled to be satisfied out of the remnants and surplus in the registry, arising from the sale of the vessel for other causes. (*The John*, 3 *Rob.* 288.) The Courts of this country administer the same relief. (*Gardner v. The New-Jersey*, 1 *Peters' Adm. Dec.* 223 ; *Zane v. The Brig President*, 4 *Wash. C. C. R.* 453 ; *The Utility*, *ante*, p. 218.) This would be done to prevent the funds passing over to a foreign owner, leaving the equitable creditor to a personal action against such owner, before a foreign tribunal. The reasons upon which such relief has been afforded do not, however, apply to this case. Morrison is not seeking to arrest

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the money in his own country, and prevent its being remitted to foreign debtors, but is pursuing it away from home, in the tribunals of the debtor's country. In such case, the money, if withdrawn from the Court, will not go to the original debtor, but to his administrator, in the capacity of general trustee, who must apply it according to the legal and equitable rights of creditors, domestic and foreign. Morrison's claim would have no priority of payment in the course of administration; and there seems to be less equity in permitting it to acquire, by decree of the Court acting as trustee of the fund, that preference which it would not obtain with the administrator, the regular trustee designated by law. Still, the principle may be broad enough to cover the case, and admit the privilege of the foreign creditors in relation to this surplus; and I am inclined to detain the money a reasonable time, to allow the libellant to present his petition for its application to the advances made for supplies and necessities furnished the ship at Greenock. I do not definitely decide the point, upon the pleadings and proofs now before me, because the attention of the counsel has not been drawn to the items composing this portion of the debt claimed by McLelland & Co. If the general doctrine is yielded, some part of the charges may not be allowable. None will be paid but such as were originally a lien on the vessel; (*Sheppard v. Taylor*, 5 *Peters*, 675;) and, on a petition claiming the funds on that ground, the parties will be prepared to instruct the Court fully as to their relative rights. The testimony now in Court can be used by either party on that application, should it be made. The libellant, Morrison, having, then, no right of action

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against the vessel, either upon the bottomry, or as assignee of McLelland & Co.'s lien, his libel must be dismissed, with costs.

The remaining subject for consideration is, the demand prosecuted in the second action. That rests upon the proposition, that the shippers of goods on board a general ship, have a lien on her for their value at the port of destination, if they have been disposed of by the master on the voyage, for necessary repairs and refitments to the vessel. This general doctrine has been heretofore considered by this Court in the case of *The William and Emmeline*, (*ante*, p. 66,) and was explicitly adopted by it in the case of *The Gold Hunter*, (*ante*, p. 300.) The State Courts fully recognise the rule of the maritime law on this subject. (*American Ins. Co. v. Coster*, 3 *Paige*, 323.) The evidence shows that the ship, on her homeward voyage, put into Charleston in distress, and that the master, having no other resources for supplying her necessities, caused the goods of the libellants to be sold, and the proceeds to be applied in refitting her. This he had competent authority to do under the exigencies of the case, (*Abbott on Shipp.* 245,) and the owner is entitled to recover the value of the goods at the port of destination, (*Id.* ; 3 *Kent's Comm.* 173, 175,) and may maintain a suit in Admiralty against the vessel therefor. (*The Ship Packet*, 3 *Mason*, 255 ; *American Ins. Co. v. Coster*, 3 *Paige*, 323 ; *Bulgin v. The Sloop Rainbow*, *Bee's R.* 116.) A decree will, accordingly, be entered in conformity to these principles, in behalf of these libellants. They are also entitled to costs. After satisfaction of that decree, the claimant will be allowed his

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costs out of the fund. Let it be referred to the clerk to ascertain the value of the goods so sold, at the time of the arrival of the vessel at this port, and report with all convenient speed.¹

Decree accordingly.

THE MARIA.

Misconduct in a seaman will not be punished by an absolute forfeiture of his wages and of his effects on board, unless it be continued or repeated, or, if occurring but once, be of a highly aggravated character.

If a master causes a seaman to be imprisoned on shore for misconduct, he ought, before leaving port, to ascertain if the seaman is willing to return to his duty.

If the seaman is imprisoned and wrongfully left behind, he will, in an action *in rem* for his wages, be entitled to include in his claim the time he is thus imprisoned and detained, and his necessary disbursements during that time, and the value of his property which was left on board; but direct damages, by way of compensation, are not, under such circumstances, recoverable in a Court of Admiralty.

If the voyage mentioned in the shipping articles is broken up without cause, and without the seaman's consent, he may recover wages for the whole voyage stipulated, deducting his earnings meanwhile.

October 19th, 1832.

THIS was a suit *in rem* for seaman's wages. The defence was, that the libellant had, by disobedience and misconduct in the port of New-Orleans, forfeited his wages, wearing apparel, &c. The shipping articles were for a voyage from Boston to New-Orleans, thence to a port in Europe, and thence to the United States. The vessel returned directly from New-Orleans to New-

¹ This case does not appear to have been subsequently moved in Court.

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York, without any cause assigned or shown for the non-performance of the agreed voyage; and it did not appear that the intended change of voyage was made known to the seamen, or acquiesced in by them. On the voyage out to New-Orleans, the conduct of the crew was unexceptionable. At New-Orleans, after the vessel had arrived at the wharf, and about noon of the day of her arrival, Rogers, the libellant, went on shore without leave, and against the orders of the mate, and returned that evening in a state of intoxication. The next morning, when called to duty, he did not turn out at the call. No other act of insubordination was shown. He was subsequently, but not the same day, put into prison, and was left at New-Orleans, when the vessel sailed.

Edwin Burr, for the libellant.

William Emerson, for the claimant.

BETTS, J.—The acts of disobedience or misconduct which are proved against the libellant are not enough to justify the withholding of all his wages. Courts will not visit, with an entire forfeiture of wages, every act of disrespect or disobedience by a seaman to his officers, or every neglect of duty. The misconduct must be either continued or repeated, or, if occurring but once, must be of a highly aggravated character, to subject a seaman to a forfeiture of the wages of a whole voyage, previously earned by him, and to justify, moreover, his imprisonment and his abandonment in a foreign port without money or clothing. This is the well-understood doctrine of maritime Courts, both in

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this country and in England. (*Abbott on Shipp.* 472, and notes; *The Mentor*, 4 *Mason*, 84, 90, 92; *Thorne v. White*, 1 *Pet. Adm. Dec.* 169, 175; *Relf v. The Maria*, *Id.* 186; *Black v. The Louisiana*, 2 *Id.* 268; *Drysdale v. The Ranger*, *Bee's R.* 148.)

The act of disobedience in the libellant was, his refusing to come back on board the vessel when ordered by the mate, and his absenting himself for half a day, and neglecting to turn out on the following morning when called to duty. No one of these offences calls for a forfeiture of wages. He behaved well up to the time of his arrival at New-Orleans; and the imprisonment he there suffered was itself a severe punishment. His not coming promptly to work on the morning after his return, was not noticed at the time, and was ascribed, no doubt properly, to the stupor following his recent debauch. After he was put in prison, there was no effort made on the part of the officers to induce him to return to his duty, and he did not even have notice that the ship was about to sail. It was the duty of the master to have given him such notice, and to have ascertained whether he was willing to return to his duty; and, if he then persisted in refusing to do so, the master would have been justified in treating him as a deserter. (*The Bulmer*, 1 *Hagg.* 163.) I am, therefore, of opinion, that he is entitled to wages for the voyage, with an abatement because of his fault, and also to the value of his property left on board. Since the voyage actually performed was varied from the one stipulated in the shipping articles, without cause and without the consent of the seamen, the latter is to be taken as the voyage upon which the wages are to be estimated. This precise point has been adjudged

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in this State. (*Hoyt v. Wildfire*, 3 Johns. 518.) The Admiralty Courts of this country adopt the same doctrine. (*Wolf v. The Oder*, 2 Pet. Adm. Dec. 261; *Moran v. Baudin*, Id. 415; *Emerson v. Howland*, 1 Mason, 52. See, also, 3 Kent's Comm. 187.)

When the voyage is improperly broken up, or the mariner is wrongfully discharged in a foreign port, he is entitled to compensation for his charges and expenses incurred in consequence, which is sometimes given in the name of wages, and sometimes in the form of damages for breach of contract. I shall not regard the libellant's imprisonment any further than as it marks the time he was out of employ, and was necessarily detained at New-Orleans. If he makes claim to compensation, founded on the act of the master in imprisoning him, it must be pursued in another form, and before a different tribunal. He ought, however, to be allowed any disbursements he was subjected to for board, or for obtaining necessaries and comforts during the period of his imprisonment.

As the usual course of trade between New-Orleans and Europe is to the port of Liverpool or Havre, either of these may be taken by the claimant as the one to which the vessel would have gone, and wages will be allowed for the ordinary time of a voyage to such port, for the time of unlading and lading, and for the return of the vessel to the United States. On the other hand, the wages earned by the libellant, from the time he left New-Orleans up to the time when, by the estimate, the vessel would have returned to the United States, and also three days' wages for the day he was absent at New-Orleans without leave, and also the sum paid by the vessel for a man to supply his

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place, during that absence, are to be deducted. As the misconduct of the libellant appears to have been a sudden freak after the vessel had arrived in port, and was attended with no ill consequences, I consider the punishment already inflicted upon him as fully commensurate with the gravity of his offence.

It will be referred to the clerk to ascertain the amount due to the libellant, in conformity with the principles which have been indicated.

THE WARRINGTON.

Where no wages are stipulated in shipping articles, a seaman may either prove, by parol evidence, what wages were agreed to be given, or may, under the statute, (*Act of July 20th, 1790, § 1, 1 U. S. Stat. at Large, 131,*) claim the highest rate payable at the port of shipment within the three months next preceding the date of the articles.

Although, in an action *in rem* for wages, a warrant is issued under a certificate of sufficient cause of complaint for Admiralty process, conformably to the statute, (*Act of July 20th, 1790, § 6, 1 U. S. Stat. at Large, 133,*) yet the owner of the vessel may intervene by answer, and bar the action by proving that the libellant had no right to sue.

A seaman who hires for a trading voyage for a specified time, cannot sue for wages until the expiration of the time, unless there be proof of his actual or constructive release.

October 19th, 1832.

THIS was an action *in rem*, for wages. The libel set forth the voyage agreed upon, and averred that it had been performed, and charged that no shipping articles for the voyage were signed by the libellant, and that the master agreed to pay him wages at the rate of \$12 per month. The answer averred that shipping articles were regularly signed by the libellant, and that no

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wages were stipulated, because the libellant agreed to serve without any; and that, if he was entitled to wages, he had no right of action, inasmuch as the term of service stipulated in the articles yet remained unexpired.

On the trial, shipping articles, signed by the libellant, were produced and proved. They contained no statement of any rate of wages agreed upon. The libellant offered parol evidence to prove what rate of wages the master agreed to pay, which evidence was objected to by the claimant. The remaining facts are stated in the opinion of the Court.

Edwin Burr and *Erastus C. Benedict*, for the libellant.

Thomas C. Pinckney, for the claimant.

BETTS, J.—I perceive no objection to the competency of parol evidence to prove an agreement with the libellant as to the amount of wages to be paid. The seaman stands, in this particular, as if no articles had been entered into; and, in such case, the contract on both sides is a subject of parol proof. (*The Porcupine*, 1 Hagg. 378; *The Harvey*, 2 Hagg. 79.) The parol evidence does not contradict the articles. They are conclusive upon the libellant no further than his express engagements go, and no implication to his prejudice can be raised from an omission which is the fault of the master and not of the mariner. Nor is the right of the libellant limited to the highest rate of wages payable at this port within the three months next preceding the date of his contract. I apprehend that,

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under the fair implication of the statute, (*Act of July 20th, 1790, § 1, 1 U. S. Stat. at Large, 131,*) the master would be inhibited from giving evidence of any agreement by the mariner to accept less than such rate of wages, although a judge of high learning and experience has intimated a contrary opinion; (*The Ship Regulus, 1 Pet. Adm. Dec. 213, note;*) but, manifestly, the restriction ought not to apply to seamen. It would often operate as a bounty to masters to disregard the injunctions of the statute, as well as a serious prejudice to mariners. The fluctuations in trade and navigation often work rapid changes in the rates of compensation to sailors. It is not unusual to find prices suddenly advance twenty-five or thirty per cent., with a brisk market and active freights; and seamen's wages, which have remained for months at from eight to twelve dollars, are known to rise at once to fifteen and twenty dollars per month for the same services. This profit should not be gained by the master and lost to the mariner, and the law will discountenance any rule applicable to the subject, which shall tend to favor the former at the expense of the latter. Assuming the contract to have been made within the United States, it was the duty of the master, specifically prescribed by the 1st section of the act of July 20th, 1790, (*1 U. S. Stat. at Large, 131,*) to have made an agreement, in writing or print, with any seaman taken on board his ship, and he incurred a penalty by omitting to do so. This written contract is held conclusive against the seaman, as well in regard to wages as to the voyage and the term of service; (*The Isabella, 2 Rob. 241; White v. Wilson, 2 B. & P. 116; Bartlett v. Wyman, 14 Johns. 260; Johnson v. Dalton, 1 Cow.*

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543;) although it is remarkable that the American statute does not require, as the English acts do, that the rate of wages shall be inserted in the articles. It would be against the plainest principles to suffer the mariner to be deprived of his rights or privileges through the misconduct or omission of the master in framing and taking the shipping contract. The statute speaks only of the master as the party acting primarily in the preparation of the written agreement. The words are, "every master, &c., shall, before he proceed on such voyage, make an agreement, in writing or in print, with every seaman or mariner on board, &c., declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped; and, if any master, &c., shall carry out any seaman or mariner, &c., without such contract or agreement being first made and signed by the seaman or mariner, such master, &c., shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping, * * * and shall, moreover, forfeit twenty dollars for every such seaman or mariner." (1 *U. S. Stat. at Large*, 131.) It is plainly intended by the statute, that the crew are to act secondarily, and by the procurement of the master, in entering into the contract. No express obligation is laid on the seamen to execute the articles. They only lose their voyage if they refuse to sign the articles; and, in my opinion, the master cannot, by taking the mariners to sea without a written agreement, avail himself of his own misfeasance, either to limit their compensation to any prior rate of wages, or to prevent

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them from proving the actual agreement by parol, when he has deprived them of the higher evidence of the shipping articles. They are not obliged to accept less than the highest rate at the port of shipment during the preceding three months; but it seems to me, that it cannot be justly implied from the statute, that they are prohibited from recovering the actual value of their services at the time, or the sum agreed by the master, however that may exceed the accustomed pay antecedent to the time of the contract. Judge Peters held, that a mariner might recover the value of privileges granted him supplementary to the shipping articles, and not written in them, the act of Congress not requiring their insertion. (*Parker v. The Caliope*, 2 Pet. Adm. Dec. 272.) However this decision may be regarded as admitting, in effect, parol proof, to vary and enlarge the compensation fixed by the articles, it is a manifest recognition of the doctrine that, in the absence, in the written agreement, of all stipulations on that head the mariner is entitled to claim pay on the footing of a verbal contract with him.

This topic has been considered more in detail in this case, because, although, under the decree which will be rendered, the libellant can derive no advantage from the principle declared, yet, that principle has a material application to a point urged by the libellant against that branch of the defence which objects to the action as prematurely brought, and insists that it must, for that reason, be dismissed. To meet the objection that the agreed term of service is unexpired, it is urged, by the libellant, that the misconduct or laches of the master, in neglecting to have shipping articles signed by the seamen, with a distinct agreement for wages,

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renders the articles inoperative as to the stipulations for the voyage and the time of service.

The articles were entered into by the libellant on the 28th of January, 1832, for the term of ten months. The voyage was a circuitous one to Central America, the West Indies, and back to any port on the North Atlantic. The libellant entered on board at the same time, and served until the arrival of the vessel in this port, on the 27th of March last, leaving eight months of the term yet unserved. No proof is given that the voyage ended at this port. The libellant left the vessel immediately on her arrival in port, and the other men were paid off a few days subsequently; but there is no evidence that the libellant was discharged by the master. He was sick and useless on the voyage, and stated to one of the crew, that he left the ship to go to the hospital. If the case were one of meritorious services, I should be disposed to imply the consent of the master to the libellant's discharge, especially if there was any appearance of bad faith or overreaching in the conduct of the master in insisting upon the terms of the contract, particularly as it does not appear that the vessel was to proceed further, or that any duty remained for the libellant to perform on board. As the case stands, however, the libellant must be limited to the rights given him by the contract; and, under that, he establishes no title to maintain the present action. The argument, that the written agreement is void because a rate of wages is not stated in it, cannot be maintained. The libellant was competent to contract for a voyage and a term of service. The engagement of ten months was to his advantage; and, on the facts in evidence, he would be entitled to claim payment of

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wages for that term, had he demanded them and offered to fulfil the engagement on his part. He took to himself, however, the right to abandon the vessel, directly on her arrival in port, and commenced this suit to recover wages. The period of his hiring yet remaining unexpired, he establishes no present right of action.

As to the point taken by the libellant, that this action was instituted by summons, upon the hearing of which process was awarded against the vessel, pursuant to the statute, (*Act of July 20th*, 1790, § 6; 1 *U. S. Stat. at Large*, 133,) and that the defence now set up was not raised before the judge on that proceeding, this Court has heretofore held, that matter in bar of the action may be set up in the answer, and be urged at the final hearing, although it was not presented on the preliminary hearing before the magistrate, on the summons. That hearing is not designed to preclude the owner from interposing a substantial defence on the merits, whether that defence is set up on such hearing or not. The silence of the claimant as to any such defence, is no implied waiver of it, nor is the decision of the magistrate, as to the sufficiency of the cause shown, regarded as conclusive. The libel must be dismissed, with costs.

Decree accordingly.

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JOSEPH WELLS AND OTHERS *vs.* JOHN MELDRUN.

Where an American vessel is condemned as unseaworthy, and is voluntarily sold in a foreign country on that account, and the voyage is relinquished, and the seamen are paid their wages only up to the time of the sale, they are entitled to two months' extra wages, under the 3d section of the act of February 28th, 1803, (2 *U. S. Stat. at Large*, 203.)

Whether the same rule would hold in the case of a sale of a vessel *in invitum*, as, by compulsory sale for the violation of a penal law, or where the sale was rendered necessary by disasters at sea, *quere*.

Where the two months' wages are due, and have not been paid to the foreign consul, as provided by the act, the seamen may recover them in an action against the master in their own names.

October 22d, 1832.

THIS was a libel *in personam*, by American seamen against the master of an American vessel, to recover two months' extra wages, under the 3d section of the act of Congress of February 28th, 1803, (2 *U. S. Stat. at Large*, 203,) which provides, "that whenever a ship or vessel belonging to a citizen of the United States shall be sold in a foreign country, and her company discharged, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid," (in the manner prescribed in the 1st section,) "and to pay to such consul, vice-consul, &c., for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman; two-thirds thereof to be paid by such consul or commercial agent to each seaman or mariner so discharged, upon his engagement on board

of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund," &c. The libellants shipped on a voyage from New-York to ports in the bay of Mexico, and back. The vessel proceeded to Campeachy, and was there condemned as unseaworthy, and sold, and the libellants were discharged, receiving only their wages up to the time of discharge. They demanded, at the time, the extra wages for which this action was brought, but payment was refused, and they afterwards returned to New-York.

Edwin Burr and *Erastus C. Benedict*, for the libellants.

Thomas L. Wells and *Charles Bushnell*, for the respondent.

BERRS, J.—The question presented is, whether the case of the libellants comes within the 3d section of the act of Congress of February 28th, 1803, (2 *U. S. Stat. at Large*, 203.) The libellants show themselves to be literally within the terms of the act in both of the particulars therein specified. The vessel was sold, and they were discharged; and the question raised is, whether the legislature intended to give the increase of wages on the mere facts that the vessel is disposed of and her crew are discharged. The respondent contends, that the sale was made *ex necessitate*, and was not one within the contemplation of the act; and that, to secure to a seaman the privilege of extra wages, the vessel must be sold voluntarily by the master or owner, as a subject of traffic, and for employment in naviga-

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tion, and not as useless in that respect, or perishing. The provisions of the act may not apply to a compulsory and involuntary sale, as for the violation of a penal law at the place of sale; (*Oxnard v. Dean*, 10 *Mass.* 143;) or where the sale is rendered absolutely necessary by shipwreck, or other casualty, which has destroyed the navigable quality of the vessel, and against which no care or effort of the master could guard. (*The Saratoga*, 2 *Gall.* 181.) The necessity for the sale, in this instance, for unseaworthiness, was not the result of any casualty to the vessel; nor was the sale compulsory, under any coercion, judicial or administrative, at the foreign port, so as to take away the discretion and free action of the master. There is no proof that the vessel was even irreparable, or that the unseaworthiness was more than the result of the natural wear of the ship on her voyage, or of her imperfect condition when sent to sea.

I do not consider the statute as contemplating solely cases of the disposal of vessels abroad, by way of trade or traffic, and as articles of merchandise. The reason of its provisions would alike embrace those cases in which the master or owner abandons a voyage, and makes sale of the vessel, to avoid the expense of repairing her, or to escape an anticipated loss, beyond her value, by continuing the voyage. There seems to be no ground for a distinction, so far as the mariner is concerned, between a sale for the purpose of positive profit, and one for the purpose of avoiding a loss. In both cases, the owner, acting through his agent, makes the sale voluntarily. The property is, in neither case, disposed of by act of law, *in invitum* as to the owner. I, therefore, consider the sale, in the present case, as one

of the descriptions of sale to which the provisions of the statute apply.

The second requisite of the statute, that the seaman shall be *discharged*, is also satisfied by the relinquishment of the voyage and the payment of his wages without claim to his further service. Had the master, because of the unseaworthiness of his ship, provided another vessel, and insisted upon completing the voyage, the mariners would have been bound to continue its prosecution. They would have had no right to insist that their contract was with a specific ship, excluding any other that was supplied in her place under an exigency fairly justifying the change; and, if they had refused to proceed in such substituted vessel, they might be deemed deserters, and be subject to a forfeiture of wages. (*Hindman v. Shaw*, 2 Pet. Adm. Dec. 264.) No such call was made upon them, and they are to be regarded, on the facts in proof, as entitled to recover the two months' pay given by the statute, as wages legally due them. (*Hindman v. Shaw*, 2 Pet. Adm. Dec. 264; *Emerson v. Howland*, 1 Mason, 48.) The Supreme Court of this State, in *Ogden v. Orr*, (12 Johns. 143,) held, that the act of 1803 created no obligation on the master to pay these extra wages directly to the seamen; and, that to allow a seaman to recover them, would deprive the fund intended to be created, of the proportion reserved by the statute, and the consul of his commission. (See, also, *Van Beuren v. Wilson*, 9 Cow. 158.) The authority of the case of *Ogden v. Orr* is of great weight; and, if it were not counteracted by high authorities, more appropriately entitled to lead this Court on a question of seamen's rights, I might feel called upon to defer to it. It is manifest,

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however, that the decision of the Supreme Court rests upon close points of common law, which restrict the remedy of the party to the direct right conferred upon him by the statute. Here there is no engagement of the master binding him to pay the extra wages, nor is a right to them given directly to the seamen as against the master. But a Court of Admiralty acts upon the spirit and equity of the claim; and, finding that the act of Congress imposes a duty on the master to pay the money to a public agent, and secures a portion of it to the crew, that Court avoids the circuitry of, first, a suit by the consul to compel the master to perform the duty, and next, another by the seaman to recover his share out of the hands of the consul. It effectuates the beneficent purpose of the statute, through the self-interest of the seaman, and does not make his privileges under the act depend upon the fidelity of the master in complying voluntarily with its requisitions, or upon the vigilance of the consul in enforcing it. To this end, it regards the money intended for the crew, as their wages, and the master as directly liable to them therefor, if he has not deposited it with a consul. I am satisfied that the statute admits of this construction, and, both because of the persuasive equity of such interpretation, and to maintain uniformity in the proceedings of the Admiralty Courts in the different districts of the United States, I shall adopt the practice already recognised and approved by those Courts, (*Hindman v. Shaw*, 2 Pet. Adm. Dec. 264; *The Saratoga*, 2 Gall. 181; *Emerson v. Howland*, 1 Mason, 48, 49; *Orne v. Townsend*, 4 Id. 549,) and consider their decisions, in this respect, as of higher authority than the decision of the State Court. (See *The Courtney*,

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1 *Edw. R.* 239.) I am satisfied that the statute will, without this method of enforcing it, be, in effect, a nullity. The extra allowance being denominated wages in the statute, the portion of it which belongs to each seaman may be recovered in this Court, against the master, as wages. Each libellant in this case is, accordingly, entitled to recover two months' wages, and his costs.

Decree accordingly.

THE REBECCA.

It is the duty of a vessel sailing with the wind free and meeting a vessel close-hauled, to avoid the latter, and the former is liable for the damages occasioned by a collision, unless it is proved that she took all proper measures to prevent it.

A usage, with coasting vessels, to run, under certain circumstances, without a watch on deck, is nugatory, and will be wholly disregarded.

Where a vessel injured by a collision is abandoned by her crew and afterwards lost, it is enough, in an action for her value, to prove that her condition at the time appeared to be desperate, even if it be proved that she might have been saved had her crew remained with her.

The measure of damages in such a case is the full value of the vessel and of her freight.

January 10th, 1833.

THIS was a libel *in rem*, for collision. The schooner Richard and Douglass, of which the libellants were owners, was on a voyage from York River, in Virginia, to New-York. The schooner Rebecca was proceeding from New-York to Philadelphia. The two vessels came into collision early in the morning, on the 1st of September, 1832, off the great swamp near Barnegat Inlet, New-Jersey, several miles from the shore. The

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wind was blowing fresh from the northeast at the time, and the Rebecca was running free before it, at the rate of about eight knots an hour. The Richard and Douglass was close hauled, and was running about northwest, at the rate of three knots an hour. No one was on deck on board the Rebecca, except the man at the helm. He was not aware of the proximity of the other vessel, nor did he see her until the instant of the collision. Evidence was offered of a custom for coasters to run by daylight, up and down the coast, without a watch on deck. The crew of the Richard and Douglass were all on deck, and, apprehending danger of a collision, took some precautions, with a view to avoid it. The Richard and Douglass was deeply laden with wheat, and the Rebecca was light. A hole was broken through the side of the Richard and Douglass, by the collision, and she was immediately abandoned by her crew, who had only time to get on board the Rebecca, the vessels separating at once. The Richard and Douglass, after being abandoned, drifted on shore, and was wrecked and totally lost, and the Rebecca proceeded directly on her course. The wind and sea were high at the time. The nearest port was Egg Harbor Inlet, distant ten or twelve miles to leeward. The other facts sufficiently appear in the opinion of the Court.

Edwin Burr and *Erastus C. Benedict*, for the libellants.—I. Since it is admitted that the Richard and Douglass was closehauled, and that the Rebecca had the wind free, the libellants are entitled to recover, because the law imposes on the vessel having the wind free, the obligation of avoiding the collision. II. The responsibility of the accident should lie on the Rebecca,

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for gross negligence in not keeping a watch. (*Jacobson's Sea Laws*, 389.) The custom sought to be set up is not proved, and is nugatory even if proved. III. The *Rebecca* is liable in damages to the full value of the *Richard and Douglass*, if the peril was at the time so great as to justify the crew of the latter in abandoning her, whatever the real danger may be proved to have been. It was hazardous to the lives of all to remain on board, and there was no apparent possibility of saving the vessel at the time.

George Wood and *Daniel Lord, jr.*, for the claimant.
—I. The rule that a vessel having a free wind shall give way to one on a wind is not inflexible, like a rule of property, and does not exempt the vessel which is closehauled from the necessity of making suitable exertions to avoid a collision. The rule referred to properly applies only where both parties see each other, or neither party sees the other, and where the accident arises solely from the non-observance of the rule. But, in this case, the parties were not on an equality, since the libellants were apprized of the danger long before the claimant was, and the accident arose in part from the negligence of the libellants in not taking proper measures to prevent the collision. II. Not having a watch on board, does not show negligence in the *Rebecca*, since the usage to run without a watch, under like circumstances, is established. The evidence to the contrary only proves that a watch is necessary where many vessels crowd the track. III. As to the measure of damages, the collision was not the proximate cause of the loss, and the claimant is therefore not liable for a loss which was the conse-

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quence of a want of skill and courage in the libellants in deserting their vessel. At the most, he is liable only for the loss caused by the collision itself. The wreck of the vessel was owing, not to the collision, but to her floating about and becoming afterwards beached and exposed to the breakers.

BETTS, J.—On some points, there is a direct conflict between the testimony of the crews of the two vessels, and, in those particulars, they are, on both sides, supported and contradicted in some degree, by witnesses from other vessels which were in sight at the time of the collision—for instance, as to whether the *Rebecca* was running with both sails on the larboard side, or with one on the larboard and the other on the starboard, or wing and wing, as it is termed; and as to the hypothesis, whether the *Richard* and *Douglass* could, by proper management, have avoided the *Rebecca*; and, also, as to the question, whether the former so manœuvred as to ensure the collision and increase its force. The counsel for the respective parties have discussed, with great minuteness and discrimination, the testimony, in its bearing upon those inquiries, but it does not appear to me important now to decide its relative credibility or weight. In my judgment, the undisputed facts of the case, under the rules of the maritime law, cast the responsibility for the collision upon the *Rebecca*.

A cardinal rule of navigation, recognised by eminent authorities, is, that a vessel running free, and approaching another going in an opposite direction, on the wind, must give way to the latter or bear the consequences of a collision, unless such collision be clearly produced

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by the misfeasance of the vessel that is closehauled. (*The Woodrup Sims*, 2 *Dods*. 83; 3 *Kent's Comm.* 230; *Story on Bailments*, § 611.) This rule was enforced in the case of *The Woodrup Sims* and in that of *The Thames*, (5 *Rob.* 308,) although, in each case, there was a cautious watch on deck, and active exertions were made by the vessel which had the wind free, to avoid the collision. But, as the advantage was so decidedly with that vessel, she was held responsible for not using it with success. She was charged with negligence, because she failed to prove that she had employed every measure within her power to prevent the collision.

In the present case, independently of that want of precaution and skill in the management of the *Rebecca* which the law implies, there was positive fault and gross negligence, in omitting to station a watch on her deck. The evidence offered to prove that a custom prevails with coasting vessels, to run along the coast in daylight without a watch on deck, must be wholly disregarded by the Court. Could a custom of that character be clearly established, it would be of no avail. No Court would uphold it. Property and persons transported along the coast would, under such a usage, be exposed to constant peril and disaster; and a custom of that character would be disregarded and pronounced nugatory, as injurious to navigation and trade, and perilous to life. It is but just to the character and conduct of the navigators upon this coast, and it is highly gratifying to the Court, to say, that the evidence fails to show that any such usage has been established, or any such practice approved, along this coast.

The disaster in this case was indisputably occasioned

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by the ignorance, on the part of the helmsman of the Rebecca, of the position of the other vessel. A slight change of his rudder, with the rapid movement of his vessel, would have been sufficient, as the evidence shows, to have carried her clear of the Richard and Douglass. His place was not the best one, nor was it a proper one, to enable him to discover objects in his way. That was the business of a look-out, who should have been so stationed as to be able to command a view of objects approaching or approached, and to apprize the helmsman when a change of his course became necessary. The failure to provide that aid and assistance to the safe navigation of the Richard and Douglass, was an act of gross negligence. It was computed by the counsel for the claimant, that the velocity of the Rebecca was 690 feet per minute, and that of the Richard and Douglass 260 feet per minute, at the moment of collision, and it was insisted that the two vessels were running on lines perpendicular to each other. The Richard and Douglass was 57 feet in length. It is, therefore, manifest, that a slight change of the course of the Rebecca, a minute or two before the time of collision, would have carried her across the line of contact, and beyond the reach of the Richard and Douglass. There is no proof, on the part of the claimant, that the helmsman of the Rebecca had notice of the approach of the Richard and Douglass, even when the vessels were only that space of time apart, or that, if aware of her proximity, he then took any measures calculated to avoid her. The Rebecca must, therefore, be held responsible for the injury caused by the collision.

It has been made a question, whether the abandon-

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ment of the *Richard* and *Douglass*, and her subsequent loss, were the necessary consequence of the injury she received in the collision. The argument for the claimant is, that by the exertion of proper intrepidity and activity on the part of her crew, she might have been saved, and that her loss is not attributable immediately to the injury inflicted by the *Rebecca*, but to the desertion of her crew. There must necessarily, in an occurrence like this, be an uncertainty whether the injury received rendered the preservation of the damaged vessel hopeless, or whether the employment of reasonable fortitude, skill and exertion might not have saved her. No Court will countenance the abandonment of a vessel at sea, by her crew, because of slight or even ordinary dangers. The duty of a sailor calls on him to brave and struggle with perils of the most sudden and appalling character. He cannot be excused in withdrawing his exertions to save his vessel, unless the hazard to life or limb is palpable and imminent—not that danger calculated to terrify men unused to the hazards of the sea, but such as would naturally daunt the courage of practised and resolute seamen. Nor are mariners justified in deserting a vessel under casualties which may menace her destruction, such as the carrying away of her apparel in a gale, or a leak, or trending upon a lee-shore; but, in emergencies of manifest peril, they must continue faithfully to strive for her preservation and security. There must, however, be a limit to this obligation. When the exigency arises, in which a firm and considerate man may reasonably believe the situation of his ship to be desperate, he is justified in yielding to the higher law of his nature, and in devoting what are apparently his last exertions to

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the rescue of his own life. It is obvious that every case must, in a great degree, be determined, in this respect, by its individual circumstances. What, in one instance, would render the condition of a vessel hopeless, might, in another, under similar dangers, not expose her to any hazard beyond the control of well-directed skill and energy.

In view of these general considerations, two points are to be decided: (1.) Whether the injury received by the *Richard and Douglass*, in the collision, was such as to render it impossible for her crew to save her; and, (2.) If, on the evidence now presented, her ultimate preservation, through the exertions of her crew, was not only possible, but was reasonably to be expected, whether, under all the facts in proof, and known to them, they were justified in abandoning her. If the injury, so far as it was known on board, was of a character to create a reasonable belief that it was a fatal one, and that the destruction of the vessel would follow suddenly, that would justify her crew in deserting her. Even if, then, her actual loss might be ascribed to their absence, and if the aid they would have been able to render her might have saved her, the responsibility of the colliding vessel would be in no way affected thereby; because, it would be unimportant whether she foundered for want of her crew, or because of the injury she received in the collision. In either aspect, it appears to me, that the weight of evidence is decidedly against the claimant. Without recapitulating the proofs, I think the clear result of them is, that the *Richard and Douglass* had received that degree of injury which, in her situation, would have rendered a continuance on board, with a view to any

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attempt to save her, imminently hazardous to the lives of her crew. She was deeply laden with wheat in bulk, so that she could not have been lightened without great labor and delay. Wheat is specifically heavier than water, so that the sinking of the vessel would have been accelerated by her cargo ; and, moreover, wheat, when wet, swells with a force that must have rapidly enhanced her danger. A hole was broken through her side, below her deck, and, in her then state of lading, below the water-mark. The wind was violent. She was on a lee shore. The breakers were running so far out that it would have been utterly desperate to attempt to beach her ; and no boat could have made land through the breakers. Her boat was too small and light to be safe for her crew, in that state of the sea ; and the only port she could have hoped to reach, was ten or twelve miles to leeward, and did not afford sufficient water, at ordinary tides, to allow the vessel to pass the bar. The crew of the Rebecca used all their exertions to separate the vessels the moment they struck, all hands then apprehending that both might go down together. No suggestion was made that the crew of the Richard and Douglass had better remain with her, or that they would receive any aid from the Rebecca, if they did so. They merely had time to get on board of the Rebecca, when the vessels were cleared of each other ; and the Rebecca pursued her course, without deeming it worth an attempt to put about and get alongside the Richard and Douglass under the expectation that any assistance would be of service to her. Looking at the case as it was then presented to those involved in the calamity, I am satisfied that the crew of the Richard and Douglass were justified in

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leaving her, and, also, that the proof shows that her loss was the immediate consequence of the collision.

I might have placed these conclusions upon the principle, that it was incumbent on the vessel committing the wrong to show, by clear evidence on her part, that the loss sustained did not necessarily result from that injury, and that such proof has not been produced by the claimant. But, even admitting that the libellants were required to show, affirmatively, that the loss was caused directly by the collision, I am of opinion that it has been sufficiently established, and shall, accordingly, decree damages to the full value of the vessel and freight, with costs.

Decree accordingly.

GARRET L. GARDNER

vs.

ANSON BIBBINS AND SAMUEL HURRY.

Where a seaman openly manifests insubordination, it is the duty of the master to apply such correction as may be required to subdue him; and, if there does not appear to have been any cruelty or needless severity, the Court will not undertake to measure the degree of punishment which was necessary.

An action against a mate by a seaman, for false imprisonment, will not lie, where the imprisonment was ordered by the master through the advice and request of the mate.

Where, in an action against two parties, for a joint tort, the respondents put in separate answers, each respondent must rely for his defence upon his own answer and the proofs, without reference to the answer of the other respondent; but, unless the answers are excepted to by the libellant, for insufficiency or uncertainty, they will be liberally construed.

A single act of insubordination on the part of a seaman, particularly if it be only a refusal to give himself up to be imprisoned, cannot be considered as mutinous, or as justifying the imprisonment itself.

February 5th, 1833.

THIS was a libel *in personam*, by a seaman against the master and mate of the schooner Nestor. As the Nestor was getting under weigh in the port of Gibraltar, the libellant was ordered by the master to let go the studding-sail halyards, but he let go another rope. The master, thereupon, asked him, if he did not know the studding-sail halyards yet; and the libellant replied, in an insolent manner, that he did, and had known them before he came on board that vessel. Thereupon, as the libel alleged, the mate, who was near, seized a handspike, and aimed a blow at his head, which was avoided by his dodging under the bow of the long-boat, but he received a severe blow from it on his shoulder, which fractured the bone. This charge was explicitly denied by the mate. The master then struck the libellant with a rope, and the libellant declared, that if he struck him again, he would knock him down. The master, thereupon, continued the chastisement until he had inflicted a number of blows. To a further charge of false imprisonment in the port of Laguna, the answer of the master alleged, that one of the seamen, by the name of Jay, had caused disorder and disturbance on board the vessel; that the master went on shore to consult the consul, and to obtain soldiers to assist in quelling the disturbance and compelling subordination; that, when the master returned on board, he ordered Jay and the libellant to come up out of the forecastle, which they both refused to do, saying they would not come up unless compelled by the soldiers; that the soldiers then came forward and ordered them up, and into the boat, and they were taken on shore; and that the master and mate, on account of such mutinous conduct, deemed it neces-

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sary, for their own safety and that of the crew, that these men should be removed from the vessel. The answer of the mate to this charge, set forth disorderly and mutinous conduct on the part of the libellant, during the absence of the master from the vessel to procure the soldiers on shore to remove Jay, and justified, upon this ground, his advice to the master to remove the libellant together with Jay.

The evidence is sufficiently set forth in the opinion of the Court.

Henry M. Western, for the libellant.

Walter Edwards, for the respondents.

BERRS, J.—The only instance in which both of the respondents united in committing any of the torts charged in the libel, was at Gibraltar. The assault charged in the libel is denied by the answers, and the proofs upon this point are as contradictory as the pleadings. The deposition of Jay, one of the seamen on board the schooner, supports the allegations of the libel in every material particular. He says that he saw two blows given by the mate with the handspike, and saw the libellant stagger under them against the boat, and saw the master fall upon him before he had recovered himself, and flog him severely with a gasket. On the other hand, two other seamen, Clark and Stewart, support the representation of the occurrence, which is given by the answers. Clark says, that the libellant replied to the master, on being chided for not knowing his duty, "I know more than you do about reeving studding-sail halyards, and you can't tell me anything

about it;" that the master thereupon came forward and gave him two or three blows with the gasket, whereupon the libellant said, that if he struck again he would knock him down; and that the master then continued flogging the libellant till he had given him seven or eight blows. Both of these witnesses say, that the mate did not strike the libellant at the time, and Clark says, that the long-boat was not on deck, but was overboard. It is also to be remarked, that Matthews, another witness for the libellant, does not, in the version he gives of the affray, support Jay or the libel. He was standing by, and, if he did not see the whole affair, the account he gives of what passed in his presence stands in contradiction to the representations of Jay. He says, that after the libellant's answer to the master's reproof, the mate turned around and asked the master if he heard what reply the libellant had given him, and added: "If I was you, I would give him a flogging;" upon which, the master came forward and took a gasket and flogged the libellant; that the mate stood by with a heaver in his hand, and said to the libellant, "If you attempt to strike the captain, I will knock you down directly," but the witness did not see him strike or make a blow with the heaver; that the libellant said to the master, whilst being flogged by him, "If you strike me again, I will let you have it;" and that the master made a motion to strike him again, and the libellant to go towards the master, as if for fight, when the mate seized him by the shoulders to prevent his advance upon the master, and tore his shirt.

The testimony of Jay thus stands contradicted by the answers of both of the respondents, and by the

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testimony of three witnesses, who had the same opportunity to see the affray that he had. Upon this proof, I must consider the charge against the mate, of having struck the libellant with a handspike, as entirely discredited and overthrown.

This Court has too frequently recognised the principle, that no unnecessary severity or oppression, by officers towards seamen, will receive countenance here, to render it necessary now to enlarge upon the subject. Still less, will the Court interfere with the prompt and efficient exercise, on the part of the officers, of every power necessary to enforce strict discipline and subordination on ship-board. In the use of this power, occasional excesses are no doubt committed. Men give way to transports of passion, or, forgetful of the rights of those under their authority, and of their own responsibility, gratify their resentment or pride of power by punishing without reason or commiseration. For occurrences of that character, this Court will exercise, with an energy equal to the exigency, its corrective and remedial powers. It will punish the wrong and remunerate the injured, with a free and strong hand. The transaction at Gibraltar was, according to the decided preponderance of proof, no abuse of authority on the part of the master. (*The Agincourt*, 1 *Hagg.* 271.) The Court will not attempt to adjust the degree of correction which the impertinence and contumacy of the libellant to the master's reproof deserved. (*Thorne v. White*, 1 *Pet. Adm. Dec.* 174.) There is no evidence that it was harsh in manner or excessive in degree, and both its continuance and its severity were justly provoked by the libellant, in threatening to knock the master down. After that open manifestation of insubordination, and

of a disposition to commit violence upon the master, it was his duty to apply a correction of sufficient vigor to subdue the refractoriness or mutinous spirit of the libellant. No more than that appears to have been done, and both of the respondents are therefore acquitted of this charge.

The remaining charge is that of false imprisonment at Laguna. Neither the testimony nor the allegation in the libel connects the mate with that, so far as to render him liable to an action. It will not be necessary to consider how far one person may be made answerable for acts of violence committed by another at his instance or instigation, when he does not personally apply force or threats, inasmuch as, in this case, the instigation, if any, was from an inferior to a superior officer; and the suggestion of the mate merely led to an order or command from the master, to which the libellant quietly submitted, without the exercise of force or constraint. The subsequent detention of the libellant at Laguna, and not the act in which the mate participated, was the forcible restraint which constituted false imprisonment, so far as the case made by the pleadings and proofs affects the mate. But the mate could have had no power in the matter after the libellant left the vessel, and it must have depended solely upon the master, whether his confinement should be continued, or whether he should be received on board again. It seems to me, that this branch of the libel makes no case against the mate; and, without adverting to the answer and the proofs adduced in support of it, and which supply a full defence in this particular, I must pronounce for a dismissal of the libel, in all its parts, as to the mate, with costs. The next

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consideration is, how far the master is affected by this charge. The pleadings and the testimony of the different witnesses give a somewhat entangled statement of the circumstances leading to the taking of the libellant away from the vessel. It is difficult to discriminate the parts of this answer which the master gives upon his own knowledge. The answer is so drawn as to leave it somewhat indistinct, whether the relation of the transactions is exclusively that of the mate, or whether the master is also to be understood as concurring in the statement of what occurred after he returned on board with the soldiers. It does not appear whether the libellant manifested any spirit of insubordination in presence of the master. Jay asserts, that he and the libellant went peaceably and directly into the boat, and ashore, when ordered by the soldiers. The master is not alleged to have interfered at all, further than to bring the soldiers on board. Matthews says, that the master ordered the soldiers to take both the libellant and Jay ashore. Stewart says, that the master went for the guard on account of Jay; that, as he was showing off from the vessel, the libellant called out to him, "If you take one, you will take both of us," meaning himself and Jay; that, when the soldiers came on board, the mate ordered the men up out of the fore-castle, but both said they would not come for him, unless the soldiers came for them; and that the soldiers went below, and had difficulty in getting them out, but, at last, they both came up, and went directly into the boat; and, as they pushed from the vessel, took off their hats and gave three cheers. Clark says, that the libellant called out to the master, as he was going on shore, "If you take one, you will take both;" that, when the

guard came on board, and took Jay, the libellant again made the same remark, and thereupon the guard took him also; and that it was his own notion, and he went ashore of his own accord. This witness says he did not hear the master tell the guard to take the libellant, and did not understand that the master intended to send him ashore.

Although the testimony of the witnesses seems to make the leaving the ship the voluntary act of the libellant, without any constraint on the part of the master, yet the answer puts it on a different footing. That assumes that he was sent on shore by the master, in consequence of his insubordinate and mutinous conduct, either as witnessed by the master, or as related to him by the mate. It must, accordingly, be considered, that the libellant was not merely permitted to go on shore with his comrade, but that he was forcibly sent out of the vessel, under arrest, and in charge of a guard of soldiers. The inquiry, then, is, whether it was proper, for the support of discipline and subordination on board the ship, to resort to this measure. The answer of the mate cannot be read on the part of the master, and the matters therein set up by the mate solely, which might afford a justification, cannot be regarded as in proof on this branch of the case. We must, accordingly, look to the individual answer of the master and to the proofs, to ascertain what justification he had for his proceedings. As before observed, the answer is rather indistinct in this particular; but, as it was the right of the libellant to compel the master to give an exact and specific answer to the matters charged in the libel, and, as he has acquiesced in that filed by the master as sufficient, the Court will be dis-

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posed to give all reasonable effect to it, by a liberal construction of its terms. Under this principle, I shall consider every fact alleged to have occurred, where the master might have witnessed it, to be averred by him on his personal knowledge, equally with the mate.

The broad allegation upon which the imprisonment is justified is, that the master, in consequence of the mutinous conduct of the libellant and Jay, deemed it necessary to remove them from the vessel, for his own safety and that of the crew. The acts which constituted that mutinous conduct, so far as the libellant was concerned, consisted of what the mate states, of his own knowledge, was done by the libellant whilst the master was gone for the soldiers, and his refusal, together with Jay, after the master returned, to come up out of the forecastle, when ordered to do so, until compelled by the soldiers. The master was on board at this last occurrence, and it is to be intended that it passed under his notice. Still, a single instance of a neglect to obey an order of this character, the purpose of which must have been well understood by the party, can hardly be deemed mutinous or culpably insubordinate. It was not a call to the ordinary duty of a sailor, but a command to place himself in the custody of soldiers, to be imprisoned in a foreign port and under foreign authority. Reluctance, or a refusal to yield willingly to such an order, does not, in my judgment, amount to mutinous conduct, or present a case where the master is justified, by the conduct or declarations of the man, in considering the vessel or crew in danger. Nor can the libellant's conduct, if he was disobedient and disorderly while undergoing punishment, be brought up in justification of the punishment itself

He was not put under arrest for refusing to come on deck, but he was ordered on deck for the sole purpose of being delivered over to the soldiers. Besides, it is very plainly inferable, from all the proofs put in, that the master did not proceed against the libellant so much on account of conduct in his own presence as upon the information and charge of his mate. He so stated unqualifiedly in his declaration before the consul, to obtain the detention of these men, and all the testimony he offers goes to show that nothing transpired before him demanding a punishment of the severity of that which was imposed. I am constrained, therefore, to say, that no facts are in proof, or even pleaded by the master, which exculpate him on this head of the complaint. He forcibly removed the libellant from the vessel, and shows no adequate reason for so doing, and is, accordingly, answerable in damages in this action for that injury. The wrongful act also includes all consequences which directly flowed from or were dependent upon it. Such was the imprisonment of the libellant in the common jail of Laguna.

The master fails in proving any threats of personal injury to himself, or of a mutinous character, which can excuse his leaving the libellant at Laguna. The evidence of the libellant's declarations is loose and unsatisfactory; and if, in terms of irritation and passion, he did use improper and menacing language respecting the master, it appears to have excited no alarm at the time, and the man continued on board and performed a long voyage, after the threats are supposed to have been made, without any exhibition of hostile or disorderly conduct. Neither is this cause for the detention of the libellant stated by the master in his deposition before the consul. He produces the evidence of a

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laborer, to prove that the libellant was in possession of a slung-shot on shore, which might have been used as a dangerous weapon, and also the deposition of Matthews, the cook, as to the libellant's threat on board; but he does not pretend, in his own deposition, that he ever regarded those circumstances as importing any danger to him or to the vessel. The general declaration of an apprehension of danger, subsequently made, and repeated in the consular certificate, is founded on the facts sworn to in the depositions of those witnesses, and not on any other particulars within the knowledge of the officers or crew of the vessel.

It results, therefore, that the master improperly imprisoned the libellant, and also left him in confinement at a foreign port, without justifiable cause; and I decree damages against him, on account of these acts, in the sum of \$100.

Decree, \$100, and costs.

THE EXCHANGE.

The deposition of a master, who has interposed a claim and answer in an action *in rem*, and continues a party to the suit, cannot be read in evidence, on the part of the owners of the vessel.

Whether the master can vary the contract contained in the shipping articles, except by proof of deceit or fraud on the part of the seaman, *quere*.

A master may displace a mariner, and allot him other services than those for which he shipped, in case of his incapacity, or because the health or safety of the ship's company requires the change.

Compensation may be allowed a mariner for extra services, different from those agreed to be rendered, and carrying a higher rate of wages—as, for example, those of a caulker.

The measure of compensation is the difference between the two rates of wages, for the time employed in the extra services.

March 14th, 1838.

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THIS was an action *in rem*, by a cook, to recover compensation for extra services as a caulker, on a voyage to South America. The libel averred, that the libellant was compelled to relinquish his business as cook on board, and do service as a caulker, at Buenos Ayres and other places, during the voyage, for seventy-five or eighty days, and that the regular wages of a caulker at Buenos Ayres were \$3 75 per day.

The master interposed a claim and answer, and denied that the libellant was employed as a caulker for more than forty days in all, and that the rate of wages at Buenos Ayres was as stated by the libellant; and alleged that the libellant was wholly incompetent to do the duty of cook, so that the crew preferred that he should be discharged from that service, and that they should do their own cooking; and, also, that he shipped upon the understanding that he would do duty as a caulker when required, being for such time relieved from duty as cook; and averred that the libellant never performed at one time the double duty of cook and caulker.

It appeared, from the shipping articles, that the libellant shipped for the voyage as cook, at the rate of \$12 per month. It was proved that he had been paid those wages in full. It also appeared that he was an experienced caulker; that the wages of caulkers who shipped for a voyage were the same as those of a mate; and that it was usual to allow seamen extra compensation for services rendered as caulkers. The evidence was contradictory as to the time during which the libellant was employed as a caulker, one of the crew testifying that, in his opinion, it did not exceed thirty days. As to the rate of wages per day, it ap-

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peared, that they varied, at different ports, from \$2 to \$3 50. The deposition of the master was offered on the part of the owners, and was objected to by the libellant.

J. D. De Lacey, for the libellant.

Walter Edwards, for the claimants.

BETTS, J.—The deposition of the master cannot be admitted. After having intervened and answered the libel, he cannot be received as a witness. If he has no interest in the suit, and is a competent witness, the owners should have moved to strike his name from the answer, and then his testimony might have been taken for the defence.

The answer sets up an agreement by the libellant to do duty as a caulker when required. This answer is not, of itself, evidence of the agreement. It would not be so in Chancery, not being responsive to the allegations in the libel. It is matter of avoidance or excuse, on the part of the claimants. Moreover, such evidence would have the effect of varying the contract in the shipping articles; and I am not prepared to say, that the claimants can be permitted to vary that contract, except by proof of deceit or fraud on the part of the libellant. There is, accordingly, no proof supporting this allegation of the answer; and the contract contained in the articles having been, that the libellant should perform the duties of cook for the voyage, for wages manifestly adapted to that service, a new and different agreement cannot, under the circumstances before the Court, be set up and substituted for the

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written one. Emergencies, arising during a voyage, may render it necessary to displace a mariner from the situation for which he shipped, and to allot him other services on board ; and the acts of the master, in so doing, would be upheld by this Court, whenever it was shown that the incapacity of the sailor or the health or safety of the ship's company required such change. (*Atkyns v. Burrows*, 1 *Pet. Adm. Dec.* 244. See, also, *Mitchell v. The Orozimbo*, *Id.* 250 ; *The Mentor*, 4 *Mason*, 84 ; *The United States v. Savage*, 5 *Id.* 460.) It is, indeed, alleged, that the libellant was unqualified for the business he undertook, never having been employed as cook before. But he was not disgraced for that cause ; and the reason offered by the answer, in justification of the exaction of different services, is, that he was shipped under an engagement to render such services whenever required. There is no legal proof of that engagement, and the Court must, accordingly, consider it not to have existed. The question, then, is, whether a seaman, shipped in one capacity, at a rate of wages sufficient to compensate that service only, can be required to perform, for the voyage, services of a more difficult and important character, and which always command higher wages, without being entitled to an increase of compensation.

Had the master found it necessary or expedient, during the voyage, to promote the libellant to the place of mate, the appointment would, under the settled rules of maritime law, have carried with it a right to corresponding wages, as incident to the new position. Such changes are of frequent occurrence, and are sanctioned by Admiralty Courts, and the promoted seaman is awarded the wages which appertain to his changed situation.

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The testimony before the Court is, that the wages of a caulker, who is shipped for a voyage, are the same as those of a mate; and, if the libellant had been put to that duty during the principal part of the voyage, I should be inclined to adjudge him the same rate of payment. But, it appears that he was only occasionally transferred to that employment, and performed, for the greater part of the time, the duties of cook. The proof is by no means clear as to the period of his employment as caulker, or as to the ordinary rate of wages allowed in the ports where the services were performed. The libellant avers that he worked in the vessel, as caulker, between seventy-five and eighty days. The master denies that extent of work, and avers that it did not exceed forty days, and one of the crew testifies, that he believes it did not exceed thirty days. The master ought to have been able to make certain, from his log-book, the amount of time during which the libellant served as caulker. I shall, therefore, accept the longest period named by him as the one for which the libellant is entitled to charge. The libel avers, that caulking wages in Buenos Ayres and Bahia were \$3 75 per day; that a caulker there declined to do the business required by the ship for less; and that the master refused to give it, and compelled the libellant to do the work. The answer denies that such rate of wages was allowed, and says, that no more than \$2 Spanish were charged in those ports; that caulkers were known to have worked for \$1 per day; and that a first rate English caulker offered to do the work for twelve paper dollars per day. No testimony is produced in support of these averments. On the part of the libellant, a witness testifies, that he has been several

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times to South America as an officer on board of vessels, and is a caulker by trade, and that a caulker's wages in South America are from \$3 to \$3 50 per day; but he does not specify the time, or what places he visited, nor does he afford the Court the means of deciding whether those wages were higher or lower than the wages at Buenos Ayres when the ship was at that port. The party claiming the extra compensation is bound to show, satisfactorily, the amount to which he is entitled. The only proof fixing, with certainty, the price the libellant's services could command per day is, what he received in this port, which nearly corresponds with the sum admitted in the master's answer to have been given at Buenos Ayres and Bahia. The lowest and not the highest sum indicated by his evidence must, accordingly, be taken, and that will be \$2 per day. The libellant having performed services not stipulated for in the contract, and which must necessarily have cost the ship more in procuring them than the wages of a seaman, he is entitled to receive that extra recompense. He will be considered as having been employed at the ordinary wages allowed per day for those services, deducting the amount paid him as monthly wages.

Let it be referred to the clerk to ascertain and report the amount payable, on the principles of this decision, allowing the vessel credit for all deductions which are properly chargeable against the libellant.

Decree accordingly.

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JOHN FREEMAN AND NICHOLAS NELSON

vs.

HIRAM BAKER.

The 6th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 133, 134,) prescribing the time and manner in which seamen may prosecute suits for wages, has reference to actions *in rem* only, and not to actions *in personam*.

The right of a seaman to sue *in personam* for his wages, is perfect as soon as the period of his service is completed.

If the seaman is discharged before the delivery of the cargo, his right to sue *in personam* for his wages is perfect from the time of his discharge.

A seaman who goes ashore, without the intention of deserting, to apply to an American consul for redress for alleged cruel treatment on board, leaves the vessel for reasonable cause, and does not incur a forfeiture of wages.

If a seaman who absents himself from his vessel is afterwards forcibly brought back, and returns to his duty, that is a condonation of his offence and a remission of the forfeiture of his wages; and a stipulation in the shipping articles that it shall not have such effect, will be held to be void.

An answer, averring, in general terms, that a vessel was supplied with a medicine-chest according to law, is not, of itself, sufficient evidence to discharge a master from his liability for a physician's bill for attendance upon a sick seaman.

An express promise by a sick seaman to pay the amount of such a bill, is without consideration and void.

May 14th, 1833.

THIS was a libel *in personam* for seamen's wages, against the master of a vessel. The vessel arrived at New-York, her port of final discharge, on the 18th of March, 1833. The libellants were discharged on the 19th, and commenced this suit on the 22d. The cargo was not unladen until the 26th.

The answer set up a dilatory exception, that the suit was not authorized under the provisions of the 6th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 133, 34.)—1st. That it was premature, because, by that act it is provided that, "as soon as the

voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and, if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful" to proceed in the manner directed by the act, provided that nothing therein contained "shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or for immediate process out of any Court having Admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast;" 2dly. That the suit was irregular, because the act provides that, except where immediate process is allowed, "it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence shall be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of Admiralty Courts, to answer for the said wages; and if the master shall neglect to appear, or, appearing, shall not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the

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judge or justice shall certify to the clerk of the Court of the district, that there is sufficient cause of complaint whereon to found Admiralty process, and thereupon the clerk of such Court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said Court, and final judgment be given according to the course of Admiralty Courts in such cases used." It was contended that these provisions of the act had a general application to suits *in personam* as well as to suits *in rem*; that such a construction was necessary to effect the object Congress had in view, which was, to prescribe the time at which wages should be deemed payable, and the mode of their recovery; and that, therefore, every species of action by which wages might be recovered, fell within the regulation.

The answer contained, also, a defence upon the merits, and claimed to set off against the amount of wages due the libellants, sundry items, the only disputed one being the amount of a physician's bill at St. Jago de Cuba. It appeared that the libellants took the yellow fever, on ship board, at that port, and, at their request, were attended by a physician from on shore, upon an express promise by them to pay his bills. After their recovery, his bills were paid by the master, and they subsequently admitted to a shipmate their indebtedness therefor to the master. The answer averred generally, that the vessel was provided with a medicine-chest and every thing else required by law for the health and healing of the crew on the voyage. No evidence was offered under this allegation. It was contended that the master was exonerated from any further charge on account of the sick seamen, by the provisions of the 8th section of the act of Congress of July 20th, 1790,

(1 *U. S. Stat. at Large*, 134,) and by those of the act of March 2d, 1805, (2 *U. S. Stat. at Large*, 330,) which enact that vessels of a certain description "shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine-chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine or attendance of physicians, as any of the crew shall stand in need of, in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner."

The answer alleged, also, a tender to the libellants, before suit brought, of the amount due to them, deducting the physician's bill and some undisputed items, and claimed to be discharged from costs accordingly.

The answer further alleged, as to Freeman, one of the libellants, that he had forfeited his wages by desertion. An entry in the log-book was produced, made by the mate on the day on which Freeman absented himself, asserting that he left without leave, and absented himself for more than forty-eight hours at one time. The shipping articles, also, were put in evidence, containing a stipulation, "that if any of the said crew disobey the orders of the said master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of such disobedience

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or absence shall be forfeited; and in case such person or persons so forfeiting wages shall be reinstated or permitted to do further duty, it shall not do away such forfeiture." The evidence upon the other side contradicted in some respects the entry in the log, and showed that Freeman left the vessel at Messina, to lay before the American consul a complaint for his cruel treatment by the mate; that his lodgings on shore were but a short distance from the vessel, within sight of the master and crew, who knew the reason why he had left the vessel; that the master caused Freeman to be forcibly carried on board by the police; and that he afterwards went peaceably to work, and did full duty during the residue of the voyage.

Edwin Burr and *Erastus C. Benedict*, for the libellants.

David D. Field, for the respondent.

BETTS, J.—It is urged, on the part of the respondent, that the provisions of the 6th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 133,) apply equally to suits *in personam* and to suits *in rem*; and it is argued that such a construction must be given to that section, in order to effectuate the general intent of Congress. The statute has, in its terms, reference only to proceedings *in rem*; and, if its language be susceptible of a broader import, so as to be made applicable to all other forms of suit, there ought to be very manifest and urgent reasons for giving it such effect, to induce the Court to depart from its letter and plain purpose. The act varies the maritime

law under which seamen acquire a right to prosecute in Admiralty, and, instead of enlarging and rendering more efficacious the remedies they before had by that law, modifies and restricts their remedies in a very important particular. Before the statute, a sailor could immediately attach the vessel for his wages, when the voyage was ended, or whenever he was entitled to an advance. The act, with a view to protect the interests of ship-owners and merchants, now requires that the seaman shall wait ten days after the voyage is ended and the ship is unladen, and that then he shall summon the master to show cause, before he is entitled to arrest the vessel by Admiralty process. As the regulations of the statute are in restraint of the privileges of seamen, and do not create a right to sue in this Court, (that right having been cœval with the institution of the Court itself,) but abridge the right, in this particular, in favor of the merchant, the operation of the act should, by well-settled principles of interpretation, be limited by the Courts to the identical case specified in it. The act has, accordingly, been accepted in this Court as having regard to proceedings *in rem* alone; and that application of it is corroborated by the explicit reservation, in the statute, of the right of the seaman to an action at common law, where the right of action accrues as soon as the wages are due. When the remedy is pursued against the master or owner individually, no reason is disclosed by the act, indicating that Congress intended to place seamen on a footing different from other suitors, or to provide their debtors with any further privileges in Admiralty than are possessed by other parties defendants at common law. There would, however, be reasons of weight for pre-

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venting mariners from arresting a vessel so abruptly. They might, thereby, often interrupt and put at hazard vital operations in navigation and commerce, or at least impose heavy expenditures and losses upon ship-owners, which they would never be able to reimburse. It would, therefore, be a provident safeguard, to place under careful restrictions this method of procedure against a ship; and the act wisely provides, that before this advantage can be had, the sailors shall give the master or owner an opportunity to satisfy their wages, and that then they shall not be permitted to seize the vessel without showing, before a proper magistrate, probable cause for the proceeding. There seems to be no reason why the act should be carried further by construction than to ensure the fulfilment of that main object. It will, accordingly, not be held to apply to actions *in personam* prosecuted in Admiralty. The arrest of the master or owner, and holding him to bail, when the voyage is ended, would interpose no impediment to the preparation of the ship for further employment, or to her pursuing the one then on hand, and would be a reasonable privilege to seamen against transient or non-resident masters or owners. The libellants, therefore, commenced their suit correctly in this case, without waiting ten days after the completion of the voyage, and without summoning the master to show cause, provided, however, the voyage was ended when the suit was instituted; because, a sailor acquires no right of action for his entire wages until the period of his service is completed.

The statute specifies some particulars which evince the termination of the voyage—as, that the vessel is at her last port of destination, and her cargo or ballast is

fully discharged. But I think it is a mistake to suppose that Congress contemplated making the full discharge of the cargo or ballast an absolute and inflexible requirement or pre-requisite to the completion of a voyage. The terms of the act are, that the wages shall be due as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery. It is obvious that a voyage may be ended, to all legal intents, without the arrival of the vessel at her last port of delivery. The misadventure or sale of the vessel, the abandonment of the voyage by the owner, the transshipment of the cargo at sea, the discharge of the seamen at an intermediate port, with or without their consent, as also acts of hostility or restraint by foreign powers, may terminate the voyage elsewhere than at the last port of delivery; and it cannot be supposed that Congress meant to designate the arrival of the vessel at her last port of delivery as the only event which could end the voyage and entitle the seamen to their wages. So, with regard to the other provision of the act, respecting the full discharge of the cargo or ballast, it is not to be intended that Congress have left it to the option of the owner when he will unlade his vessel, or whether, indeed, he will ever fully discharge the cargo or ballast. No time is limited by the act, within which he is required to do either. Instances undoubtedly occur, in long and unfortunate voyages, where the arrears of wages exceed the value of the vessel and her cargo, and it would be to the interest of the owner to suffer both to perish in port, if he could thereby excuse himself from the payment of wages. It follows, then, that neither the ending of the voyage at the port of discharge, nor the delivery of the cargo,

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should be regarded as conditions precedent to the right to sue for wages; and the Courts ought not to interpret the act as expressing, with invariable certainty, the circumstance necessary to compose a mariner's right to sue for his wages. The statute should rather be understood as fixing a period beyond which wages cannot be withheld from a sailor, whatever stipulations to the contrary may be inserted in his contract. This motive alone would sufficiently call for the enactment of the law.

In the present case, the clause of the statute adverted to has been incorporated in the shipping articles. The seamen engage that they shall not be entitled to, and will not demand their wages until the arrival of the vessel at the last port of discharge, and her cargo delivered. But this covenant can have no further or other effect than the statute, the words of which it adopts. The contract must be expounded as if it rested upon the statute alone. The law benignly shields mariners from the effect of agreements into which they may be drawn, beyond what strictly appertains to a shipping contract; and the obligation of the statutory provision, as against them, cannot be enlarged by any stipulations into which they may be drawn, unless the purport of those stipulations is fully and fairly explained to them, and an additional compensation is allowed, entirely adequate to the new obligations imposed. (*The Minerva*, 1 *Hagg.* 347; *The George Home*, *Id.* 370; *The Prince Frederick*, 2 *Id.* 394.) The right of action of the libellants was perfect when this suit was commenced, although the cargo was not fully unladen. The obligation to postpone their demand of wages until the delivery of the cargo, was

correlative to their obligation to remain with the vessel until that time, the wages being the consideration for the bargain for the services. Having been separated from the vessel by the act of the master, and with their own consent, both their service and the time for which their wages are to be estimated, ceased. Their release or acquittance from the performance of their contract, imparts the same rights to them that they would have possessed had it then ended according to its terms, and by full performance on their part. The preliminary objections are, accordingly, overruled.

The defence of a forfeiture of wages applying to Freeman, one of the libellants, will be next considered. Admitting that the entry produced from the log-book is regular, it appears to me, that a forfeiture cannot be maintained in this case, because Freeman left the vessel, for a reasonable cause, not clandestinely or with the intention of deserting, and because there was a subsequent condonation of the offence and remission of the forfeiture, had any been incurred, by the act of the master in taking him back to service. (*Abbott on Shipp. ed.* 1829, 464, 468, 472 *note.*)

The stipulation in the shipping articles, which has been set up as working a forfeiture of wages, would, on the interpretation now claimed, extend as well to every act of disobedience, however harmless and trivial, and to every truant absence beyond the moment of leave granted, as to acts of insubordination and of flagrant desertion of the vessel; and it requires no comment to show, that if such a stipulation were enforced to the letter, no seaman would have a legal remedy for wages left him, but must depend upon the generosity of the owner and master, whether his ser-

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vices should be compensated or not. Had it not been notorious that the principles upon which Courts of Admiralty administer the law in respect to the engagements of seamen, would prevent any construction of the shipping articles, so destructive of their rights, the legislature would, without doubt, have interfered for their protection against their own contracts, as they have shielded them already in matters of less vital consequence to their interests, and would have left them under the security of judicial authority. (*Abbott on Shipp.* 464, 468, 472, and cases cited in notes.) The Courts, by interpreting and executing the stipulations of seamen, in consonance with the subject matter to which they relate and with the character of the parties entering into them, have effectuated an adequate guardianship over seamen, without depriving the owner and master of any just rights. Such stipulations are considered as nothing more than penalties held over the seaman *in terrorem*, and under which nothing more will be awarded to the owner or master, than an indemnity for injuries sustained by the misbehavior of the seaman, and nothing more imposed on the seaman than a punishment, by way of fine, for his misconduct. In that way, the Courts are able to regulate the amounts chargeable against seamen by force of such covenants, conformably to the demerits of each individual case. (*The Mentor*, 4 *Mason*, 84, 90.) The ground of defence taken upon this point is, accordingly, overruled.

The remaining inquiry is, as to an allowance against the libellants of the physician's bills at St Jago de Cuba, which were paid by the master. By the maritime law, all charges for medicines, nurses, physicians, &c., fur-

nished to or provided for a seaman, during the progress of a voyage, when his disability is not the immediate consequence of his misconduct, are imposed on the vessel. (*Jus Marit. Hans. tit. 14, arts. 1, 2, pp. 72, 73, ed. 1667, Hamb. ; Laws of Oleron, arts. 6, 7 ; Laws of Wisbuy, art. 18 ; Harden v. Gordon, 2 Mason, 541.*) This principle of the maritime law has been eulogized by distinguished writers for its practical wisdom and its enlightened humanity ; and eminent judges in this country have questioned the policy of the change made by statute on this subject, and have favored the limitation of the act of Congress to the strictest reading of its letter. (*Walton v. The Neptune, 1 Pet. Adm. Dec. 142, 152 ; Hastings v. The Happy Return, 1 Pet. Adm. Dec. 255, 256 ; 3 Kent's Comm. 184, 185 ; Abbott on Shipp. 145, 146.*) The course of this Court has not been to compare the act of Congress with the law which it supersedes, in view of their relative adaptation to the interests of navigation or of seamen ; but, receiving the statute as the only existing law on the subject, it has endeavored to carry the statute into effect according to its fair import and policy.

In remitting the master to the responsibilities imposed by the maritime law, on his failure to obey the directions of the act, Congress admit, by strong implication, that that law has full force, except in so far as the statute interferes with and modifies it. When, therefore, a master attempts to shield himself from the obligations of the maritime law with respect to sick seamen, it is incumbent on him to show, by very clear and satisfactory proofs, that he has complied with every requirement of the statute in that respect. The statute substitutes a new provision for sick seamen,

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under particular circumstances and conditions; and, before a master can claim its application, he must give satisfactory evidence that he has fulfilled those circumstances and conditions. (*Harden v. Gordon*, 2 *Mason*, 541.) If the answer could be received as evidence for the respondent in this respect, it is expressed in terms so loose and equivocal as to leave room to doubt whether the requisitions of the statute have been complied with by the master. It gives the opinion of the master that he had done what was enjoined by the law, but does not set forth the facts so that the Court may determine how far they correspond with and satisfy those requirements. An answer of this description is of no other avail than to admit the respondent to support its allegations by testimony *aliunde*. None such is offered; and, as the case is presented to the Court, there is not only a want of proof that the vessel was furnished with a medicine-chest and directions in the mode pointed out by the statute, but there is an absence of all legal evidence that any medicine-chest was on board.

Nor can the engagements of the libellants to pay the physician's charges avail the respondent. The agreement was without consideration, and was made under the exigencies of a dangerous and alarming malady. Agreements of sailors with a master, on board of a vessel, in derogation of their rights and interests, are seldom regarded in Courts of Admiralty, especially when those engagements have relation to other matters than the terms and limits of their shipment. A higher objection still remains to promises of this character. The master would, by them, discharge himself of an obligation imposed upon him by positive law,

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and which the interests of humanity and commercial policy require should be fulfilled on his part with fidelity. This part of the claim of the master against the libellants is, accordingly, rejected. The residue of the accounts, which is undisputed, is allowed.

The offer made by the respondent, before suit brought, to pay the wages, deducting the physician's bills, cannot avail to excuse him from costs.

Decree for libellants, with costs.

THE PERSEVERANCE.

A contract, in order to be within the jurisdiction of Admiralty, must be one which is to be performed upon the sea, or which has relation to a maritime service.

Where money was advanced to purchase a ship, and her bill of sale was deposited with the lender, by way of security, with a power of attorney to him to sell the ship for his reimbursement: *Held*, that such a contract was not cognizable in Admiralty.

The party holding such bill of sale, acquired, by its delivery to him, no hypothecation of the vessel or interest in her, enabling him to maintain a petitory or possessory action. He took only a naked power to sell, which did not amount to a pledge *in presenti*.

Admiralty cannot give relief by converting such contract into a hypothecation, nor does such contract carry with it any of the ingredients of a lien, either express or implied.

July 5th, 1833.

THIS was a libel *in rem*, against the brig Perseverance. The libel set forth that the libellant advanced \$4,500 to one Thompson, at his request, to enable him to purchase the brig, and, on the purchase, took from him, as security, the bill of sale executed by the former owners to Thompson, and also a power of attorney constituting the libellant the irrevocable attorney of

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July 5th, 1838.

THIS was a libel *in rem*, against the brig Perseverance. The libel set forth that the libellant advanced \$4,500 to one Thompson, at his request, to enable him to purchase the brig, and, on the purchase, took from him, as security, the bill of sale executed by the former owners to Thompson, and also a power of attorney constituting the libellant the irrevocable attorney of

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Thompson, to transfer the vessel by a bill of sale; that an indenture was at the same time entered into between the libellant and Thompson, by which it was agreed that if Thompson should repay the libellant, on demand, the sum advanced by him, then the power of attorney should be delivered up, otherwise, the libellant should have full power to dispose of the vessel, to repay himself for his advances and expenses, subject to an account for the remainder; and that the vessel remained in the possession of Thompson, and was navigated by him, and the freight was appropriated to the repayment of the advances made by the libellant. The libel then alleged, on information, a sale of the vessel by Thompson to one Higbee, and that Thompson was about to depart in the vessel, and concluded with the usual prayer for the arrest and sale of the vessel, &c.

The claim and answer of Higbee excepted to the jurisdiction of the Court, and alleged a *bona fide* purchase of the vessel by him from Thompson, and that the libellant had shown no property in the vessel, or lien upon her.

Francis B. Cutting, for the libellant.

Daniel Lord, jr., for the claimant.

BERRS, J.—The essential requisite of a contract, to bring it within the jurisdiction of an Admiralty Court, is, that it must be one which is to be performed on the high seas, or which has relation to a maritime service. The most enlarged interpretation of the term "maritime," as applied to the jurisdiction of this Court, has not been extended beyond subjects or engagements

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which are necessarily connected with services to be rendered on tide waters; or supplies furnished to vessels in aid of a voyage; or labor, or materials, or cash advanced to obtain such supplies; or loans on hypothecation, subject to the event of a voyage, or payable at the end of the voyage; or questions directly touching the right of possession or ownership of ships. (*De Lovio v. Boit*, 2 Gall. 398; *Plummer v. Webb*, 4 Mason, 380; *Andrews v. The Essex Fire and Marine Ins. Co.* 3 Id. 6; *The Sloop Mary*, 1 Paine, 671; *The Tilton*, 5 Mason, 465; *Drinkwater v. The Spartan*, *Amer. Jurist*, Jan. 1830, p. 26.¹) Although it is difficult to discern any principle which distinguishes one kind of water, adapted to general navigation, from another, yet the adjudged cases and elementary writers regard the particular of *tide water* as an essential element to the jurisdiction of Admiralty.

The undertaking upon which this libel is founded partakes of a maritime character, in the usual acceptance of the term, in no other respect than that the loan of money thereby sought to be secured was made with the view of aiding the borrower in the purchase of the brig now arrested, and with the expectation that her earnings at sea would enable him to repay the loan. The vessel could not be hypothecated or mortgaged to the libellant at the time of the loan, because she was not then owned by him; and the question, whether the libellant can, as mortgagee, have a remedy in this Court *in rem*, does not arise. The depositing, afterwards, with the libellant, of her bill of sale, transferred no title to the vessel, and could not affect the right of the actual

¹ *Ward's R.*, 149.

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owner in possession to make sale of her, with full title, to another. The plain purpose of the whole transaction was, to make sure a power of disposal in the libellant over the vessel, through which his debt might be collected, and not to vest the ownership of her in him. The vessel thus becomes connected with the contract only by means of a special power of attorney, given by the owner to the libellant, to sell the brig and repay himself out of her proceeds. He had no higher title than that of agent or ship-broker. The instrument imparted to him merely a naked power, and vested in him no interest in the vessel, (*Hunt v. Rousmaniere*, 8 *Wheat.* 174, 1 *Peters*, 1,) and, accordingly, would not enable him to maintain this suit, in the character of owner, to obtain possession of her, even from Thompson, much less from his vendee. Nor did it give him any right of possession or control over the vessel, nor more than the authority to make sale of her to others, whilst she continued the property of his debtor. The libellant, therefore, has not the capacity of maintaining a petitory or possessory action for the recovery of the vessel from her purchaser, nor any action *in rem* in this Court to try the right of ownership of the claimant, under the sale of her to him by her prior owner, the debtor of the libellant.

I do not consider the agreement between the libellant and Thompson as a maritime contract. It is merely personal between the parties. It was entered into in port, and had relation to a transaction entirely on land. Whether the money loaned was applied in purchase of the vessel, or of her cargo, or of any other merchandise, the security of the lender would have been the same. That security was not made dependent upon the manner in which the money was used, and the

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lender could not, in this Court, follow the money as a thing in which he had a continuing interest. If such an interest might be supposed to subsist, the money, or its avails, could be reclaimed only by the aid of a Court of Chancery.

Independently of the authority given by the power of attorney, the libellant could not, at law or in Chancery, exact his reimbursement out of the subject to which the money was applied. And, under the contract, he can be reimbursed only in the mode provided by its terms; (*Hunt v. Rousmaniere*, 8 *Wheat.* 174, 1 *Peters*, 1;) that is, by selling the vessel under his power of attorney. To give effect to the agreement as an incumbrance on the vessel, the creditor must obtain the decree of a competent Court, converting the contract into a mortgage or pledge. That relief cannot be had in a Court of Admiralty, which possesses no power to change a written agreement, or to compel one to be executed conformably to equity and to the understanding of the parties. (*Andrews v. The Essex Fire and Marine Ins. Co.* 3 *Mason*, 6.) This Court affords its peculiar relief, by holding in pledge the thing which ought to indemnify a party, only when there is a lien, express or implied, upon the thing itself. I cannot perceive that these funds, which were advanced to aid in the purchase of a vessel, acquired a character differing from an ordinary lending of money, so as to be entitled to claim the privilege of a maritime loan.

The libel is, accordingly, dismissed, with costs.

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In Admiralty practice, in the absence of any specific rule regulating the proceeding, a replication is necessary to put in issue the facts set up by a sworn answer.

If no replication is filed, the libellant will be taken to have admitted the truth of the answer.

The method of procedure in the English Admiralty, in matters of practice, and its origin and forms, considered.

New rule promulgated in regard to replications.

September 24th, 1833.

THIS cause was noticed for hearing and proofs. The claimants contended that, no replication having been filed to their sworn claim and answer, the libellants must be deemed to have admitted the facts set up by the answer, and that the claimants were not obliged to support it by proofs. The libellants contended that the issue was complete on the filing of the answer, unless, under peculiar circumstances, a special replication was demanded. Upon an examination of the files by the clerk, under the direction of the Court, it was ascertained and reported that the general course of practice had been to file a replication, when proofs were to be taken in the cause. And such was the established practice in the old New-York Colonial Court of Admiralty. (See *the Minutes*, A. D. 1727, 1751, 1753, 1758.)

Edwin Burr and *Erastus C. Benedict*, for the libellants.

William S. Sears, for the claimants.

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BETTS, J.—This point of practice is not regulated by the standing rules of this Court, and, accordingly, it must be governed by the principles and practice prevailing in Courts of Admiralty, or under the civil law, which is the common source of procedure to the forums both of this country and of England. The course of procedure in the English Admiralty, which is the immediate source of our practice, is in conformity to the practice of the Courts of the canon law, being administered substantially in the methods and with the *formulae* of the Roman law. *Browne*, in his treatise on *Civil and Admiralty Law*, adopts that principle as the basis of his work. *Clerke*, who is regarded as a standard authority, is the earliest authentic writer on the subject. He compiled, in Latin, a *Praxis* for each tribunal, making that of the Ecclesiastical Courts the authoritative one, and refers throughout, in the other, for the rules of proceedings in Admiralty, to the usages and practice of the Ecclesiastical Courts. No other treatises on the Admiralty practice are recognised in the English Court as authority. And, indeed, it may be said, that the Admiralty in England appears to be governed by no determinate system of practice, but to conduct its business conformably to what is there understood to be the usage and custom of the Court, evidenced by its files and archives, or by the report of the registrar.

Two modes of procedure prevail in the Ecclesiastical Courts—the one termed *plenary*, the other *summary*, from a distinction observed also in the Roman law. (*Code*, 3, 9.) In the first, every act in the suit is carried on with great fulness and particularity. The pleadings are on paper, and are drawn with minute-

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ness and technical accuracy ; and it is understood that any deviation from established forms, up to the final contestation of suit, vitiates the whole proceeding. (2 *Browne's Civ. and Adm. Law*, ed. 1799, 90 ; *Consett's Eccl. Prax.* 22.) Summary actions are free from strictness of form. It seems that they may be conducted *ore tenus*, although a common usage appears to have been to exhibit short statements of the promovent's demand and impugniant's defence, in writing. (2 *Browne's Civ. and Adm. Law*, ed. 1799, 90, 136 ; *Cockb. Eccl. Prax.* 24 ; *Consett's Eccl. Prax.* 178 ; *Wood's Inst. Civ. Law*, b. 4, ch. 3, §§ 3, 5.) Whether, however, the proceedings in summary causes are oral or written, the like order and rules of pleading are to be observed as in plenary suits. "*In omnibus est petendum per procuratores, etc., ut in titulo de contestatione litis in causa plenaria.*" (*Clerke's Eccl. Prax. tit.* 34.) When an issue is to be formed in the nature of the general issue at law, it is called, contesting the cause negatively. (2 *Browne's Civ. and Adm. Law*, 104.) *Clerke*, in his work, (*Eccl. Prax. tit.* 31,) describes the course of pleading as follows : "*Sed si intendit contestari litem negative, dicendum est in hunc modum. Ego, sub protestatione de nimia generalitate, ineptudine, obscuritate, nullitate, et indebita specificatione dicti libelli, respondendo eidem, dico narrata, prout in eodem libello narrantur, vera non esse, et ideo petita prout petuntur fieri non debere, animo litem contestandi negative. Tunc actor : Libellus est articulatus, et ideo eundem in vim positionum et articulorum repeto, et per denominationem eam sic repeti et admitti peto.*"

This réaffirmance of the substantive matter of the libel or *replication* to the answer of the defendant,

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seems always to have constituted an essential part of the procedure to an issue, whether the Court adopted the practice of the civil law, or that of the common law. And, in a formal contestation of suit, when no explicit confession of the libellant's demand was made by the defendant, a replication was deemed necessary to constitute an issue. (*Code, lib. 3, tit. 9, note i, by Gothofrede.*) When matters in bar or in avoidance were set up by an exception, the civil law provided replications, duplications and triplications, by means of which the respective parties might avoid or deny new allegations, until the subject matter was reduced to a point asserted upon one side and denied upon the other. These were rather in the nature of special pleadings at common law, than mere re-assertions of prior pleadings. (*Inst. b. 4, tit. 14; Vinnius, Comm. ad. id. 856; Heinecc. Inst. b. 4, tit. 13.*) The pleadings would continue their counteracting allegations until both parties agreed upon some matter of law to be referred to the prætor, or some matter of fact to be submitted to the *judex* or *judices*. (*Heinecc. Antiq. lib. 4, tit. 7; Adams' Rom. Antiq.*)

The canon law transferred to its tribunals the practice of the civil law, and adhered so strictly to its text as to be perplexed with regulations not adapted to the nature and organization of the new Courts. And it will be found that many rules, with respect to exceptions, interrogatories, &c., would apply most awkwardly to modern Courts as they are now constituted. In the preparation of the cause for proof, however, all seem to have adhered to one course. An issue of law or of fact was formed by a replication to the exception.

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(*Consett's Eccl. Prax.* 87; *Cockb. Eccl. Prax.* 24; *Gilb. For. Rom.*)

So, also, in the common law Courts, whilst the proceedings were, in effect, *ore tenus*, the plaintiff narrated his case, the defendant made his defence, and the plaintiff reiterated his own allegations, when they were denied, or repelled those of the defendant, if he brought forward any forming a new point for issue. Cases in illustration of this abound in the Year Books and other early reports. (2 *Hen. IV.* 12; 11 *Hen. IV.* 37; 2 *Hen. V.* 25; 2 *Rich. III.* 8.) A replication is necessary, in Chancery, to put the answer in issue. (*Gilb. For. Rom.* 113; *Rules in Equity of Sup. Ct. U. S.* 13, 25.) And, even to this day, at common law, issue is not complete on filing a plea denying at large the plaintiff's ground of action, but a *similiter*, in the character of a replication, must be added on the part of the plaintiff.

The concurrent usages of all the Courts, with respect to the necessity of a replication, show evidently that it has always been regarded as an indispensable link in the chain of procedure in all properly conducted pleadings, of whatever construction or before whatever forum. There is, in the Admiralty practice, by reason of the character and effect of answers, a propriety in requiring a replication, which may not have existed in the civil law. The answer, as a pleading or method of defence, was not known to the civil law, or introduced in the early practice of the Ecclesiastical Courts. It was drawn compulsorily from the defendant as part of the libellant's proof, (*Mitf. Eq. Pl.* 199; *Cockb. Eccl. Prax.* 25,) and might be obtained by calling the defendant into Court, and having him there interrogated by the judge to the articles of the libel, or by the defend-

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ant's giving his answers in the form of a deposition. (*Id.*) The practice of requiring an answer of the defendant, on oath, to every species of libel, seems to have been introduced by the Ecclesiastical Courts, and not to have prevailed generally in the Roman practice. It arose, probably, from the supposed action upon the conscience of the parties, on which the jurisdiction of those Courts was administered. In the civil law, the prætor had, undoubtedly, a right to exact an oath from the defendant as to the truth of his defence. This was, however, considered as a judicial oath, and as the act of the Court, to avoid frivolous litigations. (*Dig. lib. 11, tit. 1, 21.*) And, in interrogatory actions, the defendant might be required, by the party petitioning, to answer, in the first instance, on oath. But it is denied, in the notes to the Code, that a party could, of right, impose the general oath on his adversary. (*Gothofrede, ad. id. loc.*) Wood, however, supposes that the defendant answered the articles of the libel on oath in all cases. (*Wood's Inst. Civil Law, b. 4, ch. 3, § 5.* See, also, *Gammell v. Skinner*, 2 Gall. 45.) *Browne* shows clearly, that in this there is a misapprehension of the doctrine of the civil law, and his views are supported by *Gothofrede*. (*Browne's Civ. and Adm. Law, 42 to 45, note; Dig. lib. 11, tit. 1, 21, note.*) And, to this practice, proceedings in England conform. (*Marriott's Forms, 363; Consett's Eccl. Prax. pt. 3, ch. 3, §§ 2, 4.*) As no oath could be compelled until after contestation of suit, which determined what points were in controversy between the parties, and the oath was then required, not to the whole case, but to the positions or specific interrogatories propounded by the promovent, it might well be that, in the civil law, the

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answer was hardly regarded in the character of a pleading, and was not, necessarily, followed by a replication. (*Cockb. Eccl. Prax.* 28.) The oath of the defendant did not conclude the plaintiff, or militate against him. It does not appear to have been allowed to have the effect of testimony in behalf of the defendant himself, and was called for and employed by the plaintiff alone, in aid of the case he had not other sufficient proof to support. (*Clerke's Eccl. Prax. tit.* 31, 34; *Cockb. Eccl. Prax.* 25; *Consett's Eccl. Prax. pt. 3, ch. 3, § 2.*) So, also, the defendant could support his defence by exacting the answer of the plaintiff to positions or interrogatories added to the proceedings after the pleadings were complete and after issue had been formed between the parties. Neither party could demand the oath of his adversary unless he had previously himself sworn to the truth of his own pleading.

From the principles recognised in the civil law, and the early practice of the common law, the course of proceeding which afterwards was established and now prevails in Chancery and in the Admiralty Court in this State, appears to have been moulded—that the libel sets forth the full case of the *actor*, and is verified by his oath when filed, and that the answer is a full reply to all its important allegations, and is also sworn to by the party putting it in. The Admiralty Court in this State has always recognised the answer as a competent mode of pleading matters ordinarily stated by way of exception or special plea. (*Colonial Court Mes.* 1727, 1758.) Having adopted that course of procedure in regard to the structure and manner of interposing the answer, and its effect, the Courts of Admiralty would, by parity of reasoning, pursue the same

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course of pleadings to the completion of the issue. In Chancery, since the pleadings have taken the shape of a case asserted under oath on one side by bill, and denied or evaded on the other by answer, it has been held, as a fundamental principle, that the answer should be regarded by the Court as entirely true, unless a replication is filed to it, and it stands contradicted by full proof. (*Peirce v. West's Ex.* 1 *Pet. C. C. R.* 351; *Gilb. For. Rom.* 45.) This proceeds upon the ground that the plaintiff, having referred to the defendant for the verification of his charge, can only displace his evidence by full proof. (*Inst. b. 4, tit. 13*; *Dig. b. 44, tit. 1.*) By bringing a case to hearing upon the pleadings alone, the plaintiff, in judgment of law, admits every fact asserted in the answer. It is also equally well settled, that the plaintiff cannot go into proof against the answer without having taken issue upon it by a general replication. (*Brinckerhoff v. Brown*, 7 *Johns. Ch. R.* 217; 1 *Moult. Ch. Prac.* 277, 299.) The obvious reason of this rule is, that the defendant cannot know that his answer is controverted, and be prepared to sustain it, unless a formal issue is taken upon it. Nor even then is a party permitted, in some of our highest Courts, to go into evidence without due notice to the defendant that he intends taking proofs. (*Equity Rules of U. S. Circuit Court, S. D. N. Y.* 73, 75, *adopted January 15th, 1833.*) The fundamental principles of Chancery practice are referred to in elucidation of those appertaining to the procedure of Admiralty Courts, because, originally, equity took its rules, both of decision and of action, from the civil law, and the usages in Chancery supply strong evidence of the true import and spirit of those principles.

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The only authorities which seem to hold that, by the civil law, a replication to an answer is an unnecessary pleading, are *Wood* and the *Code of Practice of Louisiana*. *Wood* is not minute or explicit in his statement of this point, and his observations ought, perhaps, to be limited to exceptions or formal pleas, and not to embrace answers as used in the civil law. He says that, with the answer, the defendant may give in his allegations to the plaintiff's libel, and that, after this, both parties prepare to produce their proof. (*Wood's Inst. Civ. Law*, b. 4, ch. 3, § 6.) From the manner in which he has represented the proceedings, it may be implied that he considered no allegation necessary on the part of the plaintiff after the defendant had put in his answer, unless new positions or interrogatories were interposed. The original shape of the libel and answer ought probably to be considered in connection with this statement of *Wood*. The sworn answer was, in effect, no part of the pleadings, but a portion of the evidence which the promovent presented with his proofs, and it was to be placed with and to be considered as his testimony. There might be, accordingly, no occasion or propriety in putting him to reply formally to the answer so brought in.

Article 357 of the *Louisiana Code of Practice*, is, "The cause is at issue when the defendant has answered, either by confessing or by denying the facts set forth in the petition, or by pleading such dilatory or peremptory exceptions as he is bound to plead *in limine litis*, pursuant to the provisions of this Code." Considering the petition, in that State, as equivalent to the libel in Admiralty proceedings, this Code would furnish a highly respectable and enlightened exposition of what

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should be deemed the true spirit of the practice according to the civil law, if it were not obvious that it is more particularly modelled upon the system of French jurisprudence, than drawn directly from the civil law. Its provisions throughout conform almost in letter to the rules collected in Pothier's different treatises, or to the modifications introduced by the Code Napoleon. In relation to this point, it is manifest that both Pothier and the French Code contemplate a replication as an essential part of the pleadings to constitute an issue. "Le demandeur à qui le défendeur a signifié des défenses contre le demande par lui donnée, peut répliquer à ses défenses par un acte signifié au procureur du défendeur, mais il le doit faire en trois jours. Ces répliques, ainsi que les défenses, se fournissent par un acte signifié de procureur à procureur." (*Pothier, Traité de la Procédure Civile, ch. 2, § 7, art. 1; Code Nap. de Proc. Civ. liv. 2, tit. 6, arts. 97, 98.*) "Dans les affaires qui s'instruisent par écrit, la cause sera en état quand l'instruction sera complète, ou quand les délais pour les productions et réponses seront expirés." (*Code Nap. de Proc. Civ. liv. 2, tit. 17, art. 343.*) It may be thus implied, that the Louisiana Code introduced a new rule for determining when a case shall be at issue, and is not to be regarded as an exposition of the French rule, and, through that, of the principle and mode of proceeding in the civil law.

It thus appearing, that in all Courts of this class, and at nearly all periods, a replication has been deemed an essential part of the pleadings, and that there is no rule of this Court dispensing with it, but that, on the contrary, the usage has been to exact it, I consider, that by noticing the cause for hearing without filing a rep-

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lication, the libellant must be held to admit the truth of the answer, and cannot go into proof in opposition to it. This is a technical point of practice, touching formalities in a suit, and not the essential merits of the cause; and, to avoid all perplexity or surprise hereafter, I have directed a rule to be entered regulating proceedings in this particular. The object of the replication not being to advance any new allegation, or present an issue varying in any particular from that formed by the libel and answer, but in effect to operate as notice to the respondent or claimant that his answer will not be admitted as true, I shall leave it optional, in this case, with the libellant, either to file a general replication, or to give notice, in writing, that proofs will be offered at the hearing in opposition to the answer.

The libellant having declined going to hearing upon the pleadings alone, it is not necessary for the Court to enter any special order in respect to these proceedings, and it will, accordingly, confine itself to announcing what would be the correct course of practice.

The question having arisen incidentally, without any specific motion on the part of the claimants, no costs are allowed.¹

¹ In *Dunlap's Admiralty Practice*, (p. 198,) it is said: "A replication, even as a matter of form, is seldom filed. It has not been the practice in the District Court of Massachusetts, to file the general replication to the answer." It seems, however, that in that District "answers are not required to be on oath, unless at the instance of the plaintiff." (*Id.* p. 208.) *Benedict*, in his *Admiralty Practice*, (§ 387,) says: "The libellant, if he desires to dispute the answer, files a general denial, called a replication, and the cause is at issue." "To the answer of the defendant, if the libellant does not admit its statements, he replies by a replica-

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Courts of Admiralty will not enforce, against seamen, stipulations in shipping articles which operate to their disadvantage, and are inserted in the articles in addition to the stipulations recognised by the act of July 20th, 1790, (1 *U. S. Stat. at Large*, 181,) unless it appears, from evidence outside the articles, that the seamen fully understood the stipulations and received an adequate consideration therefor.

A stipulation, that the seamen will prosecute their suits for wages in Courts of common law only, amounts to a waiver of their lien upon the vessel, and is void, without it be proved that the matter was clearly explained to them before they entered into the stipulation, and that no prejudice to their rights would be incurred by them therefrom.

Under a stipulation that all *differences* between the master or owners and the crew, shall be referred to arbitration: *Held*, that where the wages due were agreed upon and demanded, but payment of them was refused, there was no *difference*, within the meaning of the stipulation.

tion." (*Id.* § 481.) Judge *Betts*, in his *Admiralty Practice*, (p. 50,) says: "Replications need not be filed to answers without oath, taking issues in fact to the allegations of the libel. The respondent will be required, and the libellant will be permitted, each to give testimony in support of their respective allegations, the issue being complete without any replication being filed. But the allegations of a sworn answer, responsive to the charges of the libel, will be deemed admitted by the libellant, unless, within four days from the time the answer is perfected, or from the time allowed to except thereto, he files a replication or serves on the respondent's proctor a written notice that, on the trial, proofs will be offered in opposition to the allegations of the answer. Such notice, when given, supersedes the necessity of a replication." The 88th rule of the District Court for the Southern District of New-York, is as follows: "The matter set up by a sworn answer, responsive to the allegations or interrogatories of the libel, shall be deemed admitted on the part of the libellant, unless, within four days from the time the answer is perfected, or from the expiration of the time allowed for excepting thereto, replication is filed, or a written notice served on the proctor of the respondent, that on the trial of the cause proof will be offered, on the part of the libellant, in opposition to the allegations of the answer. No replication need be filed for any other purpose, to an answer taking an issue in fact upon the allegations of the libel." See, also, rule 27 of the Rules in Admiralty prescribed by the Supreme Court of the United States.

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Under an agreement, in regard to a sealing voyage, for shares of every article "procured by the crew," seamen cannot recover a share of freight earned by the transportation of merchandise.

An offer by a ship-owner, after wages to a seaman are due, and after a demand for them is made, but before suit is brought, to pay them at his counting-house, with a refusal to pay elsewhere, does not exonerate him from costs.

A settlement, after suit brought, with a seaman, whose name is continued afterwards as a party to the record, does not necessarily bar his proctor of his claim for costs.

The rule stated, as to the circumstances under which costs will be denied to a seaman, after a settlement is made with him personally.

When the proctor for the seaman intends, after such a settlement, to continue the suit to recover costs, distinct notice should be given to the party sought to be charged.

November, 1833.

THIS was a libel *in rem*, against the ship Sarah Jane, for seamen's wages, or shares of the proceeds of a sealing voyage. By the shipping articles, the seamen engaged themselves for a sealing voyage from New-York to the South Seas, Pacific Ocean or elsewhere, as the master might direct, and back to a port of discharge in the United States. The following written stipulations were subjoined to the ordinary printed form of the articles: "It is agreed, that one skin, or one gallon of oil, out of every hundred of which kind soever, shall be, and is hereby declared to be considered one share, and so on in like manner, tale or weight; by this proportion, the shares shall be estimated in and of the *nett proceeds of every other article that may or shall be procured by the said crew*, on the above voyage, and shall be brought to a port of discharge, or carried to any other market, either in the said schooner or in any other vessel or vessels which the said master may employ. And it is further understood and agreed, that all differences arising between the captain, officers, owners or crew, shall, at the completion of the voyage, be referred to the Chamber of Commerce; and, if the said Chamber of Commerce

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will not act upon and award a settlement; and suits at law are necessary, the Court of Common Pleas for the City and County of New-York shall determine it, with the right of appeal to a higher tribunal."

The vessel arrived at New-York, with a cargo of skins, on the 23d of April, 1832, and was discharged on that day and the day following. The nett proceeds of the sales, deducting various charges, were \$11,337 87. The *Sarah Jane* also brought in, on freight for another vessel which fished in company with her, nine hundred skins, the freight for which, as agreed upon, was five skins in the hundred, or five per cent. of the proceeds.

The libel was first filed in behalf of six of the crew, some of whom received their pay after the suit was brought, and released their demands. The libellants claimed to recover one per cent. of the proceeds of the skins, and one per cent. of the freight earned by the vessel. The claimants contended, 1st. That the libellants had, by their own agreement in the articles, selected other tribunals in which their claims were to be adjusted, and had thereby waived all right of action in this Court, and that this Court was barred of all jurisdiction in the matter; and, 2dly. That the claimants had been ready, since the 24th of May, to pay, at their counting-house, to the libellants, all to which they were entitled, and that the libellants were bound to demand it there, which they had not done, nor had they called there to receive it then, or at any subsequent time.

Edwin Burr and Erastus C. Benedict, for the libellants.

William S. Sears, for the claimants.

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BETTS, J.—As regards the first point made by the claimants, that the agreement between the parties has ousted this Court of jurisdiction, it cannot be doubted, as a general principle, that parties may provide for the adjustment of their controversies and claims between each other, without having recourse to Courts of justice. An amicable tribunal may be designated by agreement of parties, and Courts will uphold the determinations of such tribunals, without regard to the legality or equity of their decisions. Such method of disposing of differences is generally encouraged and upheld by Courts of law. (1 *Bac. Ab. tit. Arbitrament*; 1 *Com. Dig. tit. Arbitrament*.) And, as parties in interest may wholly dispense with Courts of law in the determination of their respective rights, it would seem to follow, that they may discriminate between different Courts, and, by their agreement, select any one to the exclusion of all others. The principle is the same, whether the parties constitute a Court for themselves, by naming referees or arbitrators, or submit themselves to some particular Court or tribunal already existing. Neither does it detract from the efficacy of such submission, that the parties may thereby forego rights or privileges secured to them by law or in their contract. Persons of full age and legal capacity are allowed to deal with their own rights at their discretion. This principle is not opposed to the rule, that a man cannot contract in contravention of statutes or of the common law. A surrender, by an individual, of the advantages which the law would impart to him, is no violation of that rule. The consideration, therefore, that the law has secured a higher and more beneficial remedy to sailors than that pro-

vided by these stipulations, would not, of itself, be sufficient to render the agreement void.

When a stipulation, of the character of the present one, has been fulfilled, so far as to submit the matter in controversy to the designated tribunal, Courts of justice will not intermeddle with the proceeding or result, except upon grounds unconnected with the merits of the decision. The question in this case, however, is not, what would be the effect of an executed agreement of this kind, but whether the outstanding contract can be used in bar of an action prosecuted in a Court having cognizance of the subject matter. Clearly, this would not be so in England; (*Thompson v. Charnock*, 8 *T. R.* 139;) and the same rule would, probably, prevail in this country. Still, there might be a remedy in damages for a breach of contract, against the party who should refuse to abide by it. Without, however, placing the decision in this case upon the incompetency of suitors to bar, by their own agreements, the usual jurisdiction of this Court, and leaving that question open for decision when it shall be presented unmixed with other considerations, I deem it more fit to dispose of this point with reference to the peculiar character of the parties and that of the contract. Moreover, if this is a valid contract between the parties, although it should not oust the jurisdiction of the Court, it might afford foundation for a claim of damages against the seamen, for a violation of its terms; and this Court might well be called upon, in the exercise of its equity powers, to regard those damages, in measuring the compensation to be awarded the libellants for wages. The subject will, therefore,

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be considered in the broader view, whether, upon the case before the Court, the libellants are, in any way, bound by the stipulation in question.

There are no facts in evidence in reference to this agreement, other than those which are disclosed by the contract itself. It will, then, be implied, that the seamen were of competent age and capacity to make the contract. The further inference would also follow, in the case of other parties, that they understood the terms of the contract, and the degree to which they bound themselves by it, and the consideration received by them in return; and the question is, whether the contracts of sailors with ship-masters and owners, in reference to services on voyages at sea, are subject to or exempt from the like implications and inferences. This description of contracts and undertakings by sailors, having relation to employment on ship-board, is regarded by Courts of Admiralty in a light widely different from agreements with ordinary parties. (3 *Kent's Comm.* 176; *The Minerva*, 1 *Hagg.* 347, 355; *Harden v. Gordon*, 2 *Mason*, 541, 556; *The Juliana*, 2 *Dods.* 510.) Seamen may possess capacity to bind themselves, in ordinary transactions, like other men; but, Admiralty Courts will intend, that in signing shipping articles, mariners do not mean to enter into any obligations beyond the simple and usual stipulations forming the essence of a shipping agreement, as recognised and sanctioned by the law maritime. Every stipulation binding a seaman, beyond the rate of wages, the time of their payment and the voyage to be performed, is, accordingly, looked upon with distrust, and is closely scrutinized before it is executed by those

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tribunals. (*The Minerva*, 1 *Hagg.* 347, 352; *Stat. at Large*, 2 *Geo. II. ch.* 36.) This doctrine is venerable for its antiquity, and for the just philosophy upon which it is based. Chancellor Kent remarks, (3 *Kent's Comm.* 176,) that, in the codes of all commercial nations, seamen are objects of great solicitude and of paternal care. He characterizes them as usually a heedless, ignorant, audacious, but most useful class of men, exposed to constant hardships, perils and oppressions, and excluded, in a great degree, from the benefits of civilization. Lord Stowell observes of them, that they are, generally, ignorant and illiterate, notoriously and proverbially reckless and improvident, and, on all accounts, requiring protection, even against themselves. (*The Minerva*, 1 *Hagg.* 355.) Judge Story characterizes them as unprotected, and needing counsel; thoughtless, and requiring indulgence; credulous, complying and easily overreached, and requiring to be treated, in reference to their bargains, as Courts of equity treat young heirs in dealing with their expectancies, wards with their guardians, *cestui que trusts* with their trustees. (*Harden v. Gordon*, 2 *Mason*, 556.)

Whilst, then, it is not denied that seamen, in common with other men, are competent to make bargains in relation to their services or property, yet, because of their heedlessness and ignorance, Courts of Admiralty assume a species of guardianship in respect to compacts with them for professional services, and do not consider them concluded by agreements which are not palpably for their benefit, further than to the extent of the few stipulations which, with simplicity and distinctness, fix their compensation, the time of its pay-

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ment, the voyage they are to perform and the period of their service. These they are supposed to comprehend, and to have nothing further in contemplation. All other agreements to which they may subscribe, in contracting for a voyage, are construed as subordinate to these, or to the rules of maritime law, and are held obligatory only so far as they are supported by that law, or are shown to be just and beneficial to the seamen, by proofs *aliunde*. Lord Stowell considers, that the mariner's contract contained, primarily, only two particulars; and that the reciprocal obligations of the parties resulting from the agreement were created and enforced by the general law, and did not depend on contract. A plain description of the intended voyage, and the rate of wages to be paid, composed the whole agreement. (*The Minerva*, 1 *Hagg.* 352.) The act of Parliament, passed in 1729, (2 *Geo. II. ch.* 36,) requiring masters of vessels to contract, in writing, with seamen, describes the particulars which are necessary constituents of the contract. To the like effect is the act of Congress for the government and regulation of seamen in the merchant service. (*Act of July 20th*, 1790, § 1, 1 *U. S. Stat. at Large*, 131.) It enacts, that every master or commander of any ship or vessel bound from a port in the United States to any foreign port, &c., shall, before he proceeds on such voyage, make an agreement in writing, or in print, with every seaman or mariner on board such ship or vessel, (except such as shall be apprentice or servant to himself or owners,) declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped, and the time the seaman shall go on board.

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The word "wages" is not used by Congress in this clause; and, in that respect, and in the addition of the memorandum clause, it varies from the English statute. It is, however, manifest, that Congress considered the provision as comprehending wages, because the same section compels the master, if he neglects to have such contract signed, to pay the highest wages which shall have been given for a like voyage at the port where the seaman shipped, within three months next preceding, besides subjecting him to a penalty for the omission. Hence, it is apparent, that the legislature deemed it of cardinal importance that the written agreement should secure seamen from all uncertainty and controversy as to the amount of wages they were entitled to receive. Still further, the 6th section of the same act declares, that the seaman shall be entitled, after the voyage is ended, &c., to the wages which shall be then due according to his contract, and shall be entitled to one-third part of his wages which shall be due to him at every port of discharge, unless the contrary be expressly stipulated in the contract. The Supreme Court of this State considers the act as enjoining that the rate of wages be specified, and holds that the mariner can recover no other wages than those described in the contract. (*Bartlett v. Wyman*, 14 Johns. 260; *Johnson v. Dalton*, 1 Cowen, 543.) But whether, in American articles, the wages agreed upon are or are not required to be inserted, the 1st and 6th section of the act of 1790 exact only those stipulations which it is palpable the sailor would clearly understand, and which must, of necessity, be expressed with plainness and simplicity—the time he is to render himself on

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board, the ports to which he is to sail and the period of his service.

The practice with merchants and shipmasters, in this country and in England, has been to swell out the agreement with a mixed crowd of engagements on the part of the mariner. These are, in many particulars, engagements to perform what the law itself imposes as a duty on the seaman, and are in themselves superfluous and inoperative for good or evil. But obligations are sometimes inserted, which are not recognised by the law maritime, or by statute law, and the inquiry then arises as to the validity and effect of such undertakings.

The Supreme Court of New-York seems disposed to regard seamen merely as persons capable of making contracts, and to construe and enforce their agreements by the same rules which are applied to the contracts of other parties. (*Webb v. Duckingfield*, 13 *Johns*. 390.) So, the Supreme Court of Massachusetts decided, in an early case, that seamen, like other men, must be bound by their contracts when fairly made. (*Goodridge v. Peabody*, 2 *Dane's Ab.* 462; *Abbott on Shipp.* 434.) In a prior case, however, in that Court, the Chief Justice had ruled, that if seamen in any case were found to have signed an unreasonable contract, the Court would relieve against it. (*Millott v. Lovett*, 2 *Dane's Ab.* 461.) Lord Stowell denies that there is any substantial difference as to this point between the Courts of law and those of Admiralty. (*The Juliana*, 2 *Dods.* 516.) Let the rule at law, however, be as it may, Courts of Admiralty proceed upon principles of liberal equity, when called upon to enforce bargains made by seamen, and hold that the party who sets up an agree-

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ment tending to the disadvantage of a seaman, is bound to produce satisfactory proofs outside of the contract, showing it to have been well understood by the mariner, and to be reasonable and just in itself. In relation to engagements which do not conform to the provisions of the statute, Admiralty Courts hold them to be utterly inefficacious and nugatory. Accordingly, contracts for a voyage specifically designated, "and elsewhere," have been held void for all beyond the ports particularly named. (*The Eliza*, 1 *Hagg.* 182; *The Countess of Harcourt*, *Id.* 248; *The Minerva*, *Id.* 347; *The George Home*, *Id.* 377; 1 *Hall's Law Jour.* 209; *Brown v. Jones*, 2 *Gall.* 477; *The Brutus*, *Id.* 526.) The customary stipulation, that parol proof of misconduct, desertion, &c., may be given in evidence, any act, law or usage to the contrary thereof notwithstanding, has not been allowed to supersede the necessity of proving a desertion by an entry in the log-book, made as required by statute. (*Abbott on Shipp. by Story*, 468, *note*; *Malone v. The Mary*, 1 *Pet. Adm. Dec.* 139; *Orne v. Townsend*, 4 *Mason*, 541; *The Phæbe v. Dignum*, 1 *Wash. C. C. R.* 48; *The Betsey v. Duncan*, 2 *Id.* 272.) So, a stipulation in the articles, that the seamen would pay for their own medicines, has been pronounced illegal, from its direct contravention of the policy of the act of Congress. (*Harden v. Gordon*, 2 *Mason*, 559.) Lord Stowell, speaking of the frame of the contract generally employed, says, that it would be difficult to point out half the impertinencies with which it is stuffed; (*The George Home*, 1 *Hagg.* 378;) and the general scope of his doctrines with respect to these instruments is, that whatever is inserted in them beyond the requirements of the statute, is to be examined with

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care and jealousy, and is not to be enforced merely because it is the agreement of the party, but because of its propriety and fairness. (*The Juliana*, 2 *Dods.* 504; *The Minerva*, 1 *Hagg.* 347; *The George Home*, *Id.* 370.)

Seamen, in these extraneous agreements, are considered as under the pupillage of Courts of Admiralty, which, proceeding upon their knowledge of the want of prudence and discretion in this class of men, will not uphold such agreements, unless well satisfied that they were entered into with a clear knowledge of the obligations they imported, and upon a fair and adequate consideration. The will of the parties, as expressed in the agreement, is not received in those Courts as absolutely the law of the contract. The eminent judge of the English Court of Admiralty expounds the principles governing the Court in this respect, with a thorough understanding of the motives and purposes of the respective parties, and a fearless application of the dictates of elevated humanity and ethics. It will be borne in mind, that the English statute declares that the contract entered into by a seaman "shall be conclusive and binding on all parties, for and during the time so agreed and contracted for." But Lord Stowell says, in *The Minerva*, (1 *Hagg.* 355,) that the act can hardly be conceived to apply to all engagements of a very special nature, which the ingenuity of later times may introduce into such contracts, not warranted by the general law, and imposing new obligations upon the mariner, and that such engagements cannot be considered binding, upon the general authority of private contracts executed by the parties, without taking into view what is the extreme disparity between the two

parties to such special contracts—the shrewdness and experience of the one, and the heedlessness and ignorance of the other. He further remarks, that he thinks the known and uninterrupted rule of the Admiralty Court, founded on its equitable nature and constitution, would be interposed for the protection of that class of individuals against the danger of such undue advantage being taken of them. (*The Minerva*, 1 Hagg. 358; *The Juliana*, 2 Dods. 504.) Lord Tenterden, approving the doctrines of the Admiralty Court in this respect, adds his sanction and authority by observing, that Admiralty, as a Court of equity, will consider how far these special engagements are reasonable or not, and will bear in mind the general ignorance and improvidence of seamen, and their inability to appreciate the meaning and effect of a long and multifarious instrument. (*Abbott on Shipp.* 434.) Judge Story, also, in *Harden v. Gordon*, (2 *Mason*, 555,) disapproves of special stipulations thrown into shipping articles, in language of great force and pertinency.

The principles pervading the authorities referred to have been frequently recognised and enforced in this Court. In the application of the sentiments of those eminent jurists to the case under consideration, it is to be noticed, that the stipulation subscribed by the libellants deprives them of the peculiar privilege secured by the maritime law. They lose their lien on the vessel and on her freight. That privilege is of the highest importance to seamen. They can rarely, if ever, acquaint themselves with the responsibility of the master or of the owner, and the case scarcely occurs in which they make any inquiry on the subject. Besides, the personal obligation of the master would be deemed

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to continue only whilst he retained command of the vessel; and, as accident or the caprice of owners might take the command from him at the very commencement of the voyage, and he might be succeeded by one of no personal responsibility, it is obvious that a right of recourse to the master for the recovery of wages would be exceedingly precarious, even if the mariners ascertained his responsibility before shipping with him. An express bargain with seamen that they should look to the master alone for the payment of wages, would, upon every consideration applicable to the parties, be adjudged a palpable diminution of their rights, and unreasonable and over-reaching in its character. If their remedy included, also, a right of recourse to the owner, and was limited to the personal responsibility of the master and of the owner, the same objections in principle would lie to such stipulation. The vessel might return, after a long absence, having secured a profitable adventure, and yet a change of proprietorship during her absence, or a loss of responsibility on the part of her owner and of her master, might leave the seamen without means to recover any of their earnings. The law will not permit the master to place them in that peril, by any direct and positive agreement obtained from them, unless their indemnity is made good in a way commensurate to the security they have foregone. Admiralty Courts will withhold their sanction from such agreements, not only upon equitable considerations growing out of the improvidence and want of intelligence of seamen in their bargains, but also upon considerations of public policy, which urgently demand the encouragement of nautical services, both for the promotion of our vast commercial navigation and for the supply of the national marine. Had, then, the stipulation in the ship-

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ping articles expressly freed the vessel, and her freight and cargo, from a lien for wages, the stipulation would be disregarded in this Court, unless there was unexceptionable evidence that it was fully understood by the seamen, and that they had been provided with a safe equivalent for the privilege surrendered by them. The compensation and wages of the crew must necessarily be understood to be embraced within the stipulation referred to, because that subject would be naturally the one out of which differences between the master or the owner and the crew would be anticipated as likely to arise. It is at least unnecessary to inquire what effect the agreement would have in cases of differences in respect to personal torts or other matters than wages or compensation for services on the voyage, as the defence under the agreement is interposed in a suit for wages. In such a suit, it is obvious that the stipulation would have the effect of an express bargain to relinquish the vessel and her cargo from a lien for wages, and to rely upon the personal responsibility of the master and owners. The suits to be brought in the Court of Common Pleas, (a Court of common law jurisdiction only,) in no way bind or charge the vessel, and are attended by a further disadvantage—that the crew cannot all join in one action, but each individual must prosecute his separate suit. It is also to be noticed, that by the laws of the State, a party who recovers less than \$50 in that Court, is charged with his own taxable costs in the suit, and with those of the adverse party, also, which, together, would rarely fall short of \$30. In the present case, it is admitted by the claimants that each libellant is entitled to a certain balance of wages, amounting in no instance

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to quite the sum of \$50. Suppose the payment of these sums is refused or unreasonably delayed, must the sailor lose them entirely? If he should sue for them in the Common Pleas, although judgment should be given in his favor, he would be subjected to costs equal to, if not greater than the whole amount of the debt, and the consequence would be that, under these shipping articles, it would be in the power of the master or owners to refuse payment of all balances under \$50. As to those sums which are admitted to be due, the claimants can hardly expect to maintain their defence, that there is a *difference* between them and the libellants, which comes within the meaning of the engagement, and there would be nothing in that for the Chamber of Commerce or the Court of Common Pleas to take cognizance of, under the supposed submission, particularly as there is evidence that the libellants offered, before suit brought, to accept those sums in full satisfaction.

Suppose, however, that the claim by the libellants to a share of the freight earned by the vessel should constitute a *difference* within the scope of the agreement, or that the seamen should deny the justness of the account, and refuse to submit to the adjustment made by the claimants, and demand a reference to the Chamber of Commerce, who is the party they must call to the arbitration? The master is the one with whom they directly contracted; but, the proofs show that before the thirty days had elapsed and the seamen were entitled to their pay, he left this State, and has not since returned. They have, accordingly, no access to him, to call him to the reference; and he cannot be bound by an award without being a party

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to it, or receiving a personal notice to submit himself to the arbitrament of the Chamber of Commerce. The owner is not designated by the articles, and the seamen are not supplied with any convenient and sure means of recourse to him, to render him a party to the arbitration. The uncertainty and complexity of the agreement would, of themselves, be cogent objections to its justness and validity as against the seamen. Neither does the stipulation, by its terms, furnish the crew with any remedy upon the award, or with any redress for the refusal or neglect of the master or owners to submit to the arbitrament of the Chamber of Commerce. It only provides for a prosecution in the Court of Common Pleas, if the Chamber of Commerce will not act upon and award a settlement, thus making the right of the seamen to sue at all, even in the Court of Common Pleas, dependent upon the condition that the Chamber of Commerce refuses to act, and imposes on the libellants the obligation of invoking and properly carrying forward the action of that body, and of proving that proper notices were given to the master and owners to that end. The difficulties and entanglements into which sailors would be led by attempting to avail themselves of such an agreement, demonstrates, very clearly, that it is not one calculated for their benefit, and cannot, in its execution, but be prejudicial to their interests. For that cause, it ought to be regarded here with great distrust, and to be allowed to bind them only upon the clearest proof that this new and unusual engagement for the recovery of their earnings was one of their own choice, and that they stand, in all respects, as well protected by it in their rights as they would be under the rules of the

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law maritime which it was designed to supplant. There is no such proof before the Court.

There are other objections to these stipulations, in respect to their want of mutuality and certainty. It appears that the mariners were mostly marksmen, and, therefore, undoubtedly unable to read writing; and there is no proof that the papers were read or explained to them. There is also an uncertainty as to what Chamber of Commerce was intended—that of New-York not being explicitly named. Moreover, the ship might discharge her cargo in any port of the United States, say New-Orleans, and be transferred to owners there, and yet the seamen be obliged to resort to the Court of Common Pleas of New-York to recover their compensation, where, if the Court had jurisdiction in the matter, and might otherwise afford them a remedy, there would be neither master nor owner to proceed against. But, without analyzing the agreement further, I am of opinion, for the causes before stated, that the shipping articles afford the claimants no bar to the action of the libellants in this Court, nor any claim to damages for the non-observance of those articles by the seamen in the particulars referred to. The libellants have a right, notwithstanding that agreement, to sue here directly, for the wages admitted to be due to them; and, in respect to that demand, the *differences* contemplated by the agreement, if it can be allowed to stand, do not exist. And, if the agreement applies to the demand for a share of the freight earned by the ship, it would be unavailing to the claimants, for reasons already assigned, and also because they cannot compel the libellants to divide their cause of action and pursue one part of it by arbitration or in a

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Court of law, while the other belongs to the cognizance of this Court, which is also competent to afford a full remedy upon both.

The libellants claim one per cent. of the freight received on the parcel of skins brought in by their vessel. This claim, in my opinion, cannot be supported. They are entitled to one per cent. of the proceeds of every article *procured by the crew*. The language of the agreement limits the right to a share of that which the services of the seamen should render the common property of the adventure. Transporting merchandise or freight does not fall within the description of proceeds "*procured by the crew*."

The claim to a portion of this freight is supposed to be strengthened by the circumstance that the skins so brought in had been chiefly taken by this crew, but had, under an agreement of partnership between the masters of the two vessels, been allotted to the other vessel; and the libellants deny that they ever assented to or were consulted upon that arrangement. If this is so, they might, perhaps, maintain their suit for their shares of the nett proceeds of the nine hundred skins, as justly belonging to their own cargo. They do not now proceed against that property with that demand, and neither the frame of their libel, nor the parties in Court, are such that the point can now be decided, whether they have any remedy in that respect. The claim for freight is rejected, and the libellants are entitled to recover the amounts due them by the ship's account, which they have admitted to be correct.

It is further proved, by the agent of the claimants, that after the accounts were made out on the 24th of May, the money was ready for all the crew at the claim-

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ants' counting-house, and every one who called for it received his pay there in full; and that these libellants would have been paid, also, if they had demanded their pay. Upon these facts it is insisted, on the part of the claimants, that they ought not to be charged with costs, but should have costs allowed them against the libellants. On the part of the libellants it is proved, that various demands were made for their wages after the sale of the skins; that they were put off by different excuses; that, after the claims were placed in the hands of proctors for collection, written notices of that fact were given to the claimants, and they were required to settle the demands with the proctors; and that, after a summons was taken out in behalf of the libellants, and a hearing thereon was had before the judge, the proctors for the libellants told the claimants' proctor and agent that the wages would be received without any charge of costs whatever, if he chose to pay them, but the offer was not complied with. It is plain that the dispute rested upon a mere punctilio, and the Court would manifest its discountenance of a litigation for that cause, by compelling each party to bear their own costs, if its decision were not controlled by the clear right of the one party. The libellants were, on the 24th of May, entitled to their money. If it was not paid to them or to their agents, they had a right, by law, to sue for it *instantly*, and no other demand was necessary than that made by the action itself. (*Ernst v. Bartle*, 1 Johns. Cas. 319.) The duty of seeking the creditor and discharging the debt rested, therefore, on the debtor, and a readiness to pay is no acquittal of that obligation, unless the creditor is bound to seek payment at a particular place. Had the master remained with the vessel,

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and the money been there ready to be paid to the sailors when called for, the Court would pointedly discourage bringing a suit for wages before a fair application for them on board. But, it seems to me, that when the master transfers his books and funds to the counting-house of his owners, the matter of right is clearly with the seamen to have their money offered to them personally. In this case, there was no difficulty in knowing where to make payment, as the claimants had written notice to pay to the libellants' proctors. As the libellants consented to receive the sum admitted to be due to them, without any charge of costs, after the Court had authorized their taking out process against the vessel, and as the claimants, by their agent, refused to pay elsewhere than at their own place of business, the claimants put themselves manifestly in the wrong, and must take the consequences by discharging the costs which have accrued. The libellants, Bright and Warden, will, therefore, recover the respective sums before referred to, together with their costs to be taxed.

The agent of the claimants has settled with the other libellants since suit brought, and satisfied their demands. He deducted \$10 from the wages of each, for the costs then incurred by their suit. No further costs will now be awarded against the claimants. If the names of those other libellants have continued to the proceedings, and further costs have accrued since such settlement, it is in a measure the fault of the claimants, as the Court, on application by them, would have ordered the libel to be dismissed as to those parties, or have compelled them to give security for costs. It by no means follows, in this Court, that a settlement with a seaman, out of Court, after suit is brought, will bar his proctor of his

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claim for costs against the respondent or claimant. A seaman may often be induced, for a pittance of ready money, to sacrifice his just rights, and the Court must, therefore, be satisfied that such settlement was proper and fair before effect will be given to it. Nor will it ordinarily allow the officers of Court to be deprived of their fees by an out-door settlement with a seaman, where his right is clear, and where he must have recovered debt and costs in the prosecution. Such settlement would be deemed a fraud on the seaman and on the officers of Court. But as, in this case, there was a disputable point as to the jurisdiction of the Court, which, if decided with the claimants, would have absorbed the libellants' whole demand, either in the costs of this Court, or in those of the Court of Common Pleas, to which they would then have been compelled to resort, I am not disposed to regard that settlement, although it may have extinguished the costs then accrued in favor of those libellants, as overreaching or inequitable. The continuance of the action before this Court in the name of the other libellants enables the proctors to secure the greater part of their fees. I shall, therefore, allow the settlement to discharge the claimants from all costs which have accrued since that settlement to those of the libellants with whom they made the settlement.

When a proctor intends continuing a suit, to recover his costs, after the claim on which the suit is founded is satisfied to the mariner, it must be done on distinct notice to the party sought to be charged, that the suit is continued for the recovery of costs only. The Court will judge of the reasonableness of the notice, in determining whether costs shall ultimately be decreed.

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Without such notice previous to further prosecution of the suit, all proceedings subsequent to the settlement will be at the responsibility of the libellant and his proctor; and, at the instance of the claimant or respondent, security could be required from those for whose benefit the action should be continued, adequate to the costs they might create. The Court affords its protection to seamen against their proctors and advocates, as well as against masters and owners, and, if a suit is continued after notice of such settlement, upon grounds and reasons which are not ultimately sanctioned by the Court, the expenses must be borne by the proctors personally, and will not be imposed on the seamen.

FRANCIS SHERIDAN

vs.

EDWARD S. FURBUR AND ANOTHER.

A ship's carpenter ranks with an ordinary seaman, and cannot disobey the orders of the second mate.

General orders from one officer will not excuse the disobedience of a seaman to the specific orders of another officer.

Where a carpenter disobeyed the orders of the second mate, on an occasion of no pressing emergency, under the erroneous impression that he was warranted in so doing, and the master had him flogged, without hearing the excuse which he offered: *Held*, that the master was liable in damages.

In measuring the amount of such damages, the Court will regard the motives of the libellant in instituting the suit.

In an action against a mate for an assault and battery, it is a sufficient justification, that he acted under the orders of the master, not knowing them to be illegal.

February 4th, 1834.

THIS was a libel *in personam*, by the carpenter against the master and first mate of a vessel, for an

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assault and battery upon the high seas. The libellant had been ordered by the first mate, several days before the assault complained of, to open a port-hole, which job was still unfinished, when the second mate, at the time the only officer on deck, ordered the libellant to assist in washing down the deck of the vessel. This the libellant refused to do ; whereupon he was reported to the master. Although he asked to be heard, the master declined to hear his excuse, which was, that he was at the time under the orders of the first mate, and also, that being of equal rank with the second mate, he was not bound to obey his orders. He was seized up to the rigging, under the orders of the master, by the first and second mates, and a dozen blows were inflicted on him by the second mate, with a nine-thread rattling. This transaction took place near the commencement of a voyage to the East Indies. Other assaults were charged in the libel, but were not sustained by the proofs. It seemed that the libellant had not been heard to complain of the treatment he received on board of the vessel, and had said, since the filing of the libel, that he was sorry he had instituted the suit, but he had been put up to doing so.

Edwin Burr and *Erastus C. Benedict*, for the libellant.

Gerardus Clark, for the respondents.

BETTS, J.—(After stating the pleadings and proofs :) In our service and in the English, the carpenter stands upon the footing of an ordinary seaman. He signs the articles, is bound to do, at times, the duty of a

mariner, and has a lien in Admiralty for his wages, because of his character as a mariner. (*The Lord Hobart*, 2 *Dods*. 104.) The French Ordinance of Marine prescribes minute regulations in respect to the qualification and employment of the ship's carpenter; but he is not, in that service, regarded in any other light than an ordinary mariner. (1 *Valin's Comm.* ed. 1776, 589.) The cook and steward are equally hired for particular services, yet they are placed on the footing of mariners, (*Black v. The Louisiana*, 2 *Pet. Adm. Dec.* 268,) and are liable to do duty as seamen whenever, in the opinion of the master, their services are so required. But it is, undoubtedly, the fair understanding of the contracting parties, that ordinarily the duties of the individual shall be confined to the services for which he specifically shipped. He is only to be employed out of the line of his engagement, upon emergencies which require his assistance in relief or aid of the ship's company. In consonance with these general principles, this Court has decided, that a mariner, shipped as cook, cannot be put stately to the duty of a caulker, without being also entitled to the increased wages of that position. (*The Exchange*, ante, p. 366.)

There is, however, no foundation for the assumption that the libellant was not bound to obey the orders of the second mate because of his equality of rank with that officer. There was no common rank between them, nor had the libellant any right of command on board, nor did he possess any exemption from the authority of the second mate when in command of the vessel, unless such exemption was secured him by the terms of his contract. In the discharge of his duties, when the sole officer on ship-board, the second

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mate executes the power of the master, and is entitled to the same obedience from the seamen. In the present instance, the second mate was the sole officer in charge of the deck at the time, and his orders, in fulfilling his charge, were accordingly of the same authority with those of the master, for the time being.

Whether or not the duty required on ship-board is demanded by the exigencies of the vessel, must be decided, in the first place, by the officer in command, and it is the duty of the crew to submit to his decision. It would be perilous to the ship and her company to permit a disobedience on their part, at sea, to a lawful command. They have always their redress in a home port, against any oppressive or unnecessary exercise of authority over them. Though carpenters, riggers, cooks or stewards ship as such, and their ordinary employment on board be in the line of their business, still it must be discretionary with the master whether or not they shall perform other occasional duties to which they are competent, in common with the ship's crew. There can be no impropriety in imposing on them a share of labor calculated to promote the health and comfort of the ship's company, and which they are competent to perform, even if it is not connected with the navigation of the vessel, or called for by any manifest exigency at the time; as, when a vessel needs to be ventilated, fumigated or cleansed at sea, the Court is not aware of any unfitness in requiring the carpenter, steward, rigger, &c., to assist in the service. When the state of the weather will permit, it is a wholesome usage, in the merchant service, to wash the vessel's decks daily. The libellant, on this occasion, was called upon to aid in this proper business. It can be as well performed

by one laborer as another, there being nothing about it especially connected with the skill or experience of a seaman. If the carpenter is exempt from such duty, it must be by force of positive agreement or indisputable usage. Neither is shown in the case, and I shall hold that the order from the second mate to the libellant was a lawful one, and that he was bound to obey it.

Neither is there any foundation for the claim, that the libellant was at the time employed under the directions of the first mate, and could not be detached from that duty by the order of the second mate. He had been put to a job of work some time previously, without injunctions to complete it within any specific time; and the first mate testifies that he had given him no order on the day in question. Every general order is of course subject to the changes required by the exigencies of the service as they occur. As well might the helmsman refuse to obey the mate's orders to vary his course, because he had received from the master general directions as to the course the ship was to keep. The conduct of the libellant, in refusing obedience to the second mate, was accordingly unjustifiable, and the question now arises, whether the respondents employed proper means of correction for his misbehavior.

This Court has, on various occasions, declared its acquiescence in the general doctrine, that the master of a merchant vessel may apply personal chastisement to the crew whilst at sea, to compel the execution of lawful orders, or to restrain a spirit of insubordination, and that the power is not limited to merely suppressing or punishing mutinous acts. A power so little in consonance with our ideas of personal independence, is yielded to shipmasters only in consideration of its

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imminent necessity. (3 *Kent's Comm.* 181.) Its employment at this day is to be justified, not so much by precedents recorded in the jurisprudence of past ages, though even there it will be found that the maritime codes exacted extreme forbearance and moderation on the part of masters in exercising the power, (*Abbott on Shipp.* ed. 1829, 136, 137; *Butler v. McLellan*, 7 *Am. Jur. Jan.* 1832, p. 70,¹) as upon the principle that the emergency of the service demands of seamen implicit obedience, and that no other means have been found adequate to ensure it promptly and efficiently. Although a sounder philosophy and a more enlightened experience may lead us to doubt the solidity of the principle upon which the authority rests, it does not belong to Courts of justice to declare a new law on the subject. Their province is to administer the law as it is delivered to them. The experiment is in progress, how far this mode of punishment may be safely dispensed with in the army and navy, and, when Congress becomes satisfied of the efficacy of more humane substitutes in those branches of public service, we may hope this may then be abolished in our mercantile navigation also.

The solicitude of Courts of justice to render the exercise of this power as little injurious as possible, is manifested in the restrictions imposed on masters of vessels with reference to it, and in the prompt satisfaction administered in every case of its vindictive or unnecessary use. (*Abbott on Shipp.* 136; *Watson v. Christie*, 2 *Bos. & Pull.* 224; *Butler v. McLellan*, before cited; 3 *Kent's Comm.* 181, 182.) A great

¹ *Ward's R.* 219.

variety of cases have been presented to the consideration of Admiralty Courts and Courts of law in the United States, in all of which the general authority of the master to apply personal chastisement in correcting offences against the police and discipline of the vessel, or in coercing prompt obedience to orders, has been recognised; but, at all times, he is admonished to use great caution and consideration, and not to allow his punishment to be disproportionate to the offence, and is reminded that he will be treated as a trespasser whenever the bounds of reasonable moderation are passed, or any unnecessary or intemperate use is made of his power. (*Rice v. The Polly & Kitty*, 2 *Pet. Adm. Dec.* 420; *Thorne v. White*, 1 *Id.* 172; *Brown v. Howard*, 14 *Johns.* 119; *Sampson v. Smith*, 15 *Mass.* 365.)

There seems to be no wavering in the doctrines of the numerous cases upon this subject, and, applying them, with liberal indulgence, to the acts of the master in this instance, it does not appear to me that he has made out a reasonable justification for his conduct. The disobedience of the libellant was not in a spirit of insubordination, but was based upon a claim to rightful exemption from the particular service exacted of him. He was entitled to be heard upon that subject, and to have his objections disposed of on the provisions of the shipping articles, or by the express decision of the master. The emergency of the occasion did not demand an instant execution of the order, right or wrong, and it was accordingly every way fitting that the claim should be calmly considered and temperately determined.

The authority of a master at sea is represented by

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the law as corresponding to that of a parent over his child, or that of a master over his apprentice. But this is by way of description, and to mark the moderation and feeling of kindness with which the authority should be exercised, and not to measure its extent; because its exercise is not left so largely to the discretion of a ship-master, even supposing that a father would be excused for inflicting a blow upon his child for every act displeasing to him, or a master be suffered to visit with a disgraceful flogging every trivial deviation from duty on the part of his apprentice. But, with regard to a ship-master, the persons over whom his authority is to be exerted are entitled to the privileges and immunities of citizens in all respects other than in their qualified subjection to the discipline on ship-board; and every provision of law which sanctions the deprivation of their rights as freemen, evinces, at the same time, a jealous solicitude in their behalf, by imposing on the master a heavy responsibility in the employment of his power. The experience of this Court by no means sanctions the epithets often applied to sailors as a class. There is more of metaphor and fancy than of just discrimination in imputing to their dispositions and tempers the wildness and impetuosity of the elements on which they are employed, controllable only by an unremitted exhibition of menace or of physical force. I am satisfied that this is an unwarranted estimate of the character of American seamen. It is undoubtedly necessary that their whole exertions should be at the instant command of their officers, and that they should not be allowed to interpose their own inclinations or judgments to intercept or delay an order given them, and

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considered necessary by the officer giving it. But I am persuaded it would strengthen and not diminish the discipline and efficiency of crews, to impress on them the conviction, that if they would be tractable and attentive on their part, reliance would be placed on their experience and disposition to do their duty, and no resort would be had to compulsory and harsh means for overawing them or compelling their services. Judicious conduct of masters in their treatment of crews would better command confidence and fidelity than ropes-ends and hand-cuffs. Reasonable kindness, mingled with firmness, with mariners at sea, no less than with troops on land, would, no doubt, stimulate their endeavors far better than the dread of bodily sufferings or scurrilous or boisterous reproaches and oaths. Though seamen, as a class, are heedless and improvident, they go into their employment as a business for life, and many of them, of the younger classes, are in possession of no inconsiderable intelligence. They look forward to advancement by means of their good conduct and capacity; and I am persuaded it can rarely happen, in an American vessel full manned with our own seamen, that a master cannot obtain officers, from the men before the mast, competent to navigate the ship. In the numerous cases brought into this Court on claims for wages and for damages for personal torts, I have generally found seamen prompt to do justice to their officers, however rigid in discipline and urgent in carrying forward the work on board, when fairly treated themselves by the officers. Insubordination and disorders among the crew are too generally found to have had their origin in the unfitness of sub-officers for their places, and in their passionate,

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reckless and wrongful bearing towards the men. The crew have a common concern in requiring every man to perform his share of service. Vessels avoid taking supernumerary hands. The work neglected by one will fall upon his shipmates, and they will, out of selfishness, if from no higher motive, discountenance idleness or disorder in any of their companions, and be no less solicitous than the officers, that every man shall stand to his post and do his duty. These observations fairly apply to the average conduct of seamen. There are exceptions, to which the attention of this Court is too frequently called; but it is not within the experience of this Court that just cause of complaint often exists against native seamen, or in respect to mixed crews, without a very painful degree of blame being discovered in the conduct of the officers, tending to produce the difficulty. I am satisfied it is time the experiment should be made, under resolute and temperate masters, to enforce fidelity and police on board of merchant vessels, without the use of the lash or other bodily correction, and thus to elevate the character and ambition of seamen, and render them deserving the great trusts constantly confided to their hands. I can entertain no doubt of its practical good effects, and this Court will lend an active agency in aid of the reform, by withholding pay from or awarding damages against seamen for misconduct, according to its powers and the justice of the case.

The discipline in this case was unnecessarily abrupt and severe. There was no occasion for rigorous or prompt proceedings, and the master was bound to have at least inquired into the causes of complaint, if not to have given the orders himself, in the first in-

stance, directly to the libellant. Instead of doing either, he fell upon him, and had the punishment inflicted instantly, without making any effort to persuade him to his duty, and without allowing him to offer an excuse or apology. Indeed, he was peremptorily forbidden to speak. I should be disposed to visit such intemperate conduct with a punishment in damages corresponding to the wantonness of the wrong, were it not that the declarations of the libellant, since the voyage ended, very clearly import that he did not bring the action to vindicate his rights and redress the injury he received, but to satisfy the malevolence or hostile feelings of some one else against the master and mate. This fact takes away all the libellant's claim to damages, beyond a remuneration for his actual injury; and, as he does not himself regard the indignity of a disgraceful punishment, the Court will not make it a ground for exemplary compensation. The law gives him some damages, because he has sustained a wrong not fully justified. But, under the circumstances of the case, the Court might properly limit the decree to nominal damages, were it not that it seems fit and important to enforce upon masters of vessels the necessity of being always able to show a reasonable occasion for the application of personal chastisement to seamen, and to make it clear that they were unable at the time to vindicate their authority over the ship by milder means. The French Ordinance of Marine required the master to assemble his officers and receive their deliberate assent before he inflicted chastisement on his sailors. The Code Napoleon has given no sanction to such a punishment. The rule of the English Admiralty is, that the master must look well to see that he has

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the means of justifying himself before the Courts of his country, when called to account for correcting a seaman. And our law, without pointing out any specific mode by which the master is to proceed, cautions him that he must conduct with calmness and prudence, when he assumes to exercise the prerogative of personal chastisement or imprisonment. Upon consideration of all the particulars, I shall decree against the master the sum of \$25, with costs.

The case of the mate stands upon a different footing. There is no evidence against him other than that he assisted in bringing the libellant aft and tying him to the rigging to be punished. All this was done under the express orders of the master. Those orders he was bound to obey. There was nothing immoral, or, so far as the mate was authorized to decide, illegal in those orders. He would, accordingly, have been guilty of a breach of duty had he refused to execute them. It belongs to the master to determine what punishment shall be inflicted for offences on board. He having decided that the libellant was guilty of disobedience, and having ordered him to be flogged for that, the mate and crew were bound to carry his orders into execution; and, though the master acted without legal justification, his authority is a sufficient protection to them. This would not be so, if they had known he was acting illegally, or if he had punished with weapons or in a way to endanger life or limb. Then it would have been their duty to refuse to aid him, and, under extreme circumstances, they would have been justified in even interfering to protect the seaman against the violence and wrong of the master. So, also, if the mate had been himself designedly the

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cause of the punishment which he inflicted, by urging or advising it, he might be held to have been a co-trespasser with the master. There is no evidence of the kind against this respondent. He only acted in aid of the master, and in pursuance of his direct commands. This was well known to the libellant. The libel must accordingly be dismissed as to him. I shall also give him costs, because the libellant, by his own declarations, shows that he had no ground of complaint against him.

Decree accordingly.¹

THE ELIZA AND ABBY.

The master or pilot in command of a vessel is only bound to exercise ordinary skill and prudence in getting his vessel under weigh.

Where a collision occurs from inevitable casualty, without the fault or negligence of either party, each must bear his own loss.

¹ In Richard H. Dana's *Seaman's Friend*, p. 154, it is said: "The carpenter must, when all hands are called, or, if ordered by the master, pull and haul about decks, and go aloft in the work usual on such occasions, as reefing and furling. But the inferior duties of the crew, as sweeping decks, slushing, tarring, &c., would not be put upon him, nor would he be required to do any strictly seaman's work, except taking a helm in case of necessity, or such work as all hands join in. The carpenter is not an officer, has no command, and cannot give an order even to the smallest boy, yet he is a privileged person. He lives in the steerage with the steward, &c., and, in all things connected with his trade, is under the sole direction of the master. The chief mate has no authority over him, in his trade, unless it be in case of the master's absence or disability. In all things pertaining to the working of the vessel, however, and, as far as he acts in the capacity of a seaman, he must obey the orders of the officers as implicitly as any of the crew would, though perhaps an order from the second mate would come somewhat in the form of a request. Yet there is no doubt that he must obey the second mate, in his proper place, as much as he would the master in his."

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In case of a collision, bad management on the part of the libelled vessel, but which is not the proximate cause of the collision, will not subject her to damages.

In a libel for collision, where there is strong probable cause of action, but the libel is dismissed, costs will not necessarily be imposed on the libellant.

May 24th, 1834.

THIS was a libel *in rem*, on a collision at the quarantine ground, in New-York harbor, alleged to have occurred through the negligence or mismanagement of the claimants' vessel. It appeared that the *Atticus*, the libellants' ship, had come into port, from the West Indies, a day or two previous to the accident, and was to lie at quarantine for some time. The *Eliza* and *Abby* had dropped down the day preceding, prepared to go to sea, and, through careless and improper management that night, had been allowed to drag her anchor before a southeast wind for some distance; but, when the wind died away, she had come to, and had taken a berth about one hundred yards from the *Atticus*. The weather in the morning was calm; and, according to the testimony of the master, the mate and a pilot on board of the *Eliza* and *Abby*, there were indications of a favorable wind for going to sea, though a witness upon the other side testified that the clouds were threatening in the northwest. The small anchor of the *Eliza* and *Abby* was tripped preparatory to getting under weigh, but, before it was raised to the deck, or the crew had commenced hauling on the main anchor, the vessel was struck by a sudden and violent gust. The tide was flood, and the wind came from the northwest, or west northwest, so that the wind and tide acted in contrary directions. The libellants charged that the collision subsequently took place in consequence of the *Eliza* and *Abby's* dragging her

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main anchor, and running down upon the Atticus; and they introduced evidence to show, that if the kedge anchor had been promptly dropped, the two would have held the ship in her position and prevented the accident. The master and mate of the Eliza and Abby testified, on the other hand, that she did not drag her anchor, but that both vessels were driven ahead by the gale, and ran out their anchors to the end of the chains, and, being then brought up, took a sheer, and, by the pressure of the tide, were drawn off diagonally to the course they had run, upon the wind, and towards each other, until they came into collision, in a trough of the sea, with great violence. The witnesses testified, that the accident occurred within the space of five minutes after the squall came up, and most of them thought the time did not exceed three minutes. After the collision, efforts were immediately made on board of both vessels, by setting some of their sails, to veer them apart, but unsuccessfully. The sails were shivered, and the vessels continued striking with a force that endangered the safety of both. The master of each called to the other to slip his cable and drop off, but neither was willing to incur the hazard of such a movement. The wind was blowing directly upon the Long Island shore, from which the vessels were distant from ten to twelve hundred yards, the Eliza and Abby being to windward, and it was supposed that, as her best bower anchor was slipped, the other would not be sufficient to hold her from going on shore. After the vessels had continued in collision from fifteen to thirty minutes, the master of the Eliza and Abby slipped his cable, when the wind drove his vessel astern, and she rubbed against the Atticus, and did the chief damage which the latter vessel sustained.

The Eliza and Abby.

Edwin Burr, for the libellants.

Daniel Lord, Jr., and *Charles Walker*, for the claimant.

BURR, J.—The libellants charge upon the *Eliza* and *Abby* carelessness and mismanagement in various respects. It is urged, that the state of the weather rendered it improper for her to attempt to go to sea, and that raising one anchor, where she lay, was improvident and negligent management. The opinions and judgments of witnesses given after the event, cannot be relied upon to determine whether the conduct of the master of the *Eliza* and *Abby*, previous to the squall, or under its exigencies, was justifiable or prudent. Whether he was guilty of culpable negligence in either respect, must be decided upon the circumstances before him at the moment. The squall was from the northwest. It seems, that in this harbor a southeast wind is usually followed by one from the northwest, and that the changes are not uncommonly abrupt and violent. Nothing more was discernable at the time, on circumspect and careful observation, than the common signs of a change of wind from its then point to the opposite one. Experienced navigators, not connected with the vessel, give their opinion upon the facts, that the conduct of the pilot was sufficiently guarded and prudent in that state of the wind, in heaving up the anchors and getting himself in readiness for putting the vessel under way. An extreme caution and apprehensiveness might have induced a pilot to wait until the weather had assumed a settled character; yet, there seems to have been no want of ordinary precaution in proceed-

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ing upon the then state of the wind and atmosphere, without preparation against a sudden and dangerous change. Officers in charge of a vessel must rely essentially upon their own judgment, in adopting or rejecting measures of mere precaution as to making sail or coming to. The law exacts of them, in so doing, no higher responsibility than the exercise of ordinary foresight and skill.

It is, however, strongly insisted, that if he was justified in proceeding with his preparations to get under way, still, when the squall broke upon him, he was culpably negligent in not paying out cable and dropping the kedge anchor, which had been raised; and many suggestions and hypotheses have been urged to show that the two anchors would have held the *Eliza* and *Abby* in her position. In respect to the arguments and inferences upon this topic, it is to be observed, that there is no proof that the *Eliza* and *Abby* dragged her main anchor at all. The position in which the two vessels struck would strongly countenance the supposition of the master and pilot of the *Eliza* and *Abby*, that both vessels had run over their anchors with great velocity, and, being then suddenly checked in that direction, were drawn backwards, but diagonally, and on lines converging towards each other, and in that manner were brought into collision, without the anchor of either having dragged. Upon that supposition, the additional aid of the kedge was not required to hold the *Eliza* and *Abby* at her anchorage, and would have been of no service unless so dropped as to hold and bring up the ship before she reached, on her course, the point of her check and recoil by the main cable. There is no evidence enabling the Court

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to form an opinion as to the justness of that hypothesis, nor as to the sufficiency of the kedge to hold the vessel without the aid of the main anchor.

But, admitting that the small anchor, if let go in due time, might have averted the collision, it does not follow that the omission to do that particular act casts upon the claimant any responsibility for the consequences which ensued. The witnesses represent that the coming on of the gust was sudden and violent in the extreme, and that the two vessels were brought together within three minutes after it struck them. That interval evidently allowed no opportunity for selecting or putting in execution means to avoid any particular disaster. The natural apprehension, when the blast struck the vessels, must have been, that each of them was itself in instant and imminent peril of destruction. It is not to be expected that the measures which might afterwards have been deemed most appropriate, would have occurred to the minds of the master or pilot of the *Eliza and Abby*, in the confusion and alarm naturally attendant upon a peril of the kind. Their exertions would be first put forth for the safety of their own vessel and crew, without regard to the situation of others. The *Atticus* was, at the same time, flying with like velocity before the gale, without any apparent restraint from her anchor; and, if any attention had been given to her, it would have been reasonable to suppose that both vessels were driving with their anchors, and would continue to run in the same direction. They came into dangerous proximity only when, after being brought up by their anchors, they were carried in a new direction, veering towards each other. Neither that movement, nor the cause of

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it, could be foreseen or was to be expected. It appears to me, then, that the collision was the result of an inevitable casualty, and was owing to no fault or negligence on the part of the Eliza and Abby, and that each party must, accordingly, bear his own loss. The authorities supporting this doctrine are numerous. (*Abbott on Shipp.* 354; *Story on Bailm.* §§ 514, 608; *The Woodrop Sims*, 2 *Dods.* 85; *The Dundee*, 1 *Hagg.* 120.)

The libellants further insist, that if no legal blame is imputable to the Eliza and Abby for the act of collision, she is responsible for the consequent damages, because, with reasonable skill and exertion on her part, all those injuries might have been prevented. It was urged that, as she was the windward vessel, and had come last into the position leading to the collision, and was ready for sea, and was therefore better prepared to manage herself when adrift, it was incumbent upon her to slip her cable and thus free the two ships from their dangerous contiguity. The proof is clear, that such a procedure would necessarily have involved great exposure and danger to the vessel which should let go her anchor. She would have been carried stem foremost towards a lee shore, but a few hundred yards distant, without anchors to stay her; and, if the violence of the gale had continued, the use of sails for her government would have been impracticable, and she must inevitably have been cast ashore. The witnesses on both sides consider, that the exposure would have been so great from slipping the cables of the vessels in their then situation, that, as a measure of the last extremity, it would have been warranted only to avoid instant and certain destruction, from the concussion of the

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vessels. Each vessel would properly have struggled to the last against taking a step so perilous to herself, and have left the hazard to her companion. There is some difference of opinion as to which vessel could have done it most readily, and with the least risk. But that is matter of conjecture alone, and not to be weighed or determined by judicial decision. There was no paramount obligation on the claimant to assume the peril, since it was not his fault which produced the exigency; and, the Eliza and Abby not being legally responsible for the collision itself, no obligation was imposed on her, in this respect, that did not equally rest on the Atticus. Each officer, looking first to the preservation of his own vessel, was also bound to do every thing the circumstances of the case would permit, for the safety of the other; and I do not perceive in the proofs, or in the judgment of skilful experts upon the facts, cause for imputing any blamable misconduct to the Eliza and Abby, which should render her liable for the injuries the other ship sustained.

It has been further urged, that the Eliza and Abby was improperly worked the night previous, and was allowed to drift from her anchorage and come into dangerous proximity to the Atticus. Had injuries been received from the Eliza and Abby that night, in the progress of her movement or in the manner of her coming to, there would have been color for holding her chargeable for such injury, because of careless or unskilful management. But she had been brought to a safe anchorage, and had taken a berth at a suitable distance from the Atticus, and in no way threatening to the latter vessel. It is true, that the accident would probably not have happened, had the Eliza and Abby

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retained the situation at which she was anchored the night before. So, it may be said, it would not have happened if she had remained at the New-York wharf. Her shifting her anchorage was not the proximate cause of the collision. It was, undoubtedly, in one sense, connected with it and the cause of it, but so indirectly and remotely as not to subject her to the consequences. If, when she first anchored, she had taken the berth at which she finally brought up, and had remained there till the occurrence of the gale in the morning, there would be no ground, upon the proofs, to charge her with fault or negligence in coming to at that point. The libellants cannot invoke, in support of their action, any antecedent misconduct of the claimant's vessel, not necessarily and directly connected with the injury they afterwards sustained.

The libel must be dismissed. But, as the libellants sustained serious injury, without fault on their side, and as, under the circumstances known to them at the time, there was strong probable cause of action, I shall not impose costs on them.

Libel dismissed, without costs.

THE VICTORY.

In a suit brought by a seaman for wages, a Court of Admiralty will not allow an out-door settlement, without the concurrence or knowledge of the libellant's proctor, to bar his claim for costs.

The action may be pursued after such settlement, for the purpose of determining the right to costs; and the Court will, to that end, inquire into the fairness of the settlement with the seaman.

Costs unnecessarily created by side issues on that investigation, will be decreed

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against the libellant, and may be set off against those allowed him upon the main issue.

Where, in a suit *in rem* for wages, an answer to the libel on the merits was filed, and issue was joined, and afterwards a supplemental answer was filed, alleging a settlement, to which the libellant replied, alleging fraud in the settlement, and noticed the cause for hearing upon that issue, and it appeared that there was a good cause of action for more than the amount paid on the settlement, the costs upon the main issue were decreed to the libellant, and the claimant was allowed to set off the costs created by the new issue.
December 3d, 1884.

THIS was a libel *in rem*, in which the master intervened as claimant. The libel demanded a balance of wages, amounting to \$190, due for an outward and homeward voyage of fourteen months continuance. The libellant alleged, that he shipped on a voyage from New-York to Marseilles, and thence back to a port of the United States, but that the vessel went from Marseilles to Tarrogon, in Spain, thence to Gibraltar, thence to Rio Janeiro, thence to Monte Video, and thence to Boston; that he was forced to leave the vessel at Rio Janeiro, by the cruel usage of the chief mate; and that the voyage was changed to South America without his knowledge or consent.

The master alleged, in his answer, that the libellant shipped for the voyage actually performed; that, from his insubordinate and dangerous conduct on board the vessel, the claimant had determined to discharge him at Rio Janeiro, to which the libellant assented; that previous to such discharge, in a controversy between him and the first mate, during the absence of the master on shore, the libellant attacked the mate with a drawn knife, and, to avoid being arrested for his mutinous conduct, jumped overboard and swam ashore; that the American Consul at Rio Janeiro, on hearing the libellant and the claimant, endorsed on the roll of the

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crew his consent that the libellant be discharged from the vessel; and that he was accordingly discharged.

This answer was filed in the latter part of August, 1834, and the case was set down for hearing at the September term, proofs having been taken on the part of the libellant. Some misapprehension having arisen at the hearing, between the counsel, as to the effect and operation of a stipulation admitting certain evidence of the first mate, the claimant moved to have the cause put off, and, on the 13th of September, obtained an order for commissions to examine witnesses out of the country, and for a stay of proceedings for six months. On the 3d of October, the claimant filed a supplemental answer by way of plea *puis darrein continuance*, alleging a settlement of the matter with the libellant by paying him \$50, and setting forth a release in full, by the libellant, of his demand, for the consideration of one dollar and divers good causes. On the 2d of November, the proctor for the libellant filed a replication to the supplemental answer, averring that the release was fraudulently obtained from the libellant without the knowledge and consent of his proctor, and without payment of the taxable costs due in the suit, and to defraud the officers of the Court of their legal fees. On the same day, an order was entered by the Court, at the instance of the proctor for the libellant, allowing the libellant to notice the cause for hearing upon the latter issue, notwithstanding the order staying the proceedings for six months to take testimony, and, thereupon, the cause was set down upon the calendar for hearing at the November term; but, as the judge was sitting in the Circuit Court at the time, there was no opportunity to bring it on. On the 6th

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of November, the proctor for the libellant gave the proctor for the claimant notice in writing, that the cause was continued in prosecution to recover the taxable costs unpaid therein, and that, on payment thereof, the suit would be discontinued. At the December term, the cause came on to be heard, when it was insisted, for the libellant, that, notwithstanding the settlement out of Court, the vessel should be held answerable for costs incurred to the time of the hearing, and for all which should subsequently accrue in enforcing their payment, while it was contended, on the part of the claimant, that costs were merely an incident to the suit or cause of action and fell of course when the latter was disposed of.

Erastus C. Benedict, for the libellant.

David D. Field, for the claimant.

BETTS, J.—In the case of *The Sarah Jane*, (*ante*, p. 401,) this Court decided that an out-door settlement of a cause with a seaman prosecuting for the recovery of wages, would not be allowed, as of course, to debar the libellant's proctor from the recovery of costs; and that, when the right to recover the debt and costs was manifest, the Court would regard such settlement as a fraud on the seaman and on the officers of the Court, in respect to their costs, and would retain possession of the thing against which the suit was proceeding, until the taxable costs were satisfied. That decision did not assume a power in the Court to deny to seamen, in common with other suitors, the right of compromising their law suits, for arrangements of this kind made in

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that case were allowed to stand in full force; but it proceeded upon the broad doctrine, that the Court is bound to exercise a supervisory authority over agreements of that character entered into with seamen personally, and to see that no injustice or wrong is done them. There can, however, be no doubt, upon general principles, that a Court of Admiralty will retain a suit, to pass upon questions of costs, although the principal cause of action is adjusted and no other matter remains for decision. The doctrine may be applied to other proceedings in the Court, as well as to actions by sailors for wages. It would follow, as a necessary incident to the course of procedure *in rem*, where the thing itself remains with the Court until all the equities connected with the lien upon which it was attached are satisfied, and because, after a warrant is issued, the costs become, equally with the main demand, a portion of the lien. The Court of Admiralty will support a reasonable and fair offer of settlement made to a sailor before suit brought, by imposing costs on him if he refuses the offer and sues for wages at large. And since, if the action is defended, it is to be carried on by the claimant or respondent without expectation of reimbursement from a common mariner, the Court will be cautious not to construe an offer to settle, into an admission of the justice of the demand. It is rather regarded as an attempt to avoid an expensive litigation, by paying a specific amount to be free from it. Accordingly, if the matter is referred to the Court, the precise sum offered is decreed, and without costs, when the proof does not show that the mariner must have recovered more had the suit progressed. The Court acquaints itself with the fair rights of the seaman, and endeavors to give a

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liberal construction to offers of compromise with him. After a suit is in Court, however, it is subject to the supervision of the proctors. In Courts of civil law, according to the strict principles of practice, the parties themselves have no authority over the cause after their regular appearance by proctors. The proctor is regarded as *dominus litis*, having the management and control of all the proceedings, until a final decree, or until his authority is revoked. In actions by mariners especially, the promovents are regarded as essentially under tutelage. Every dealing with them personally by an adversary party, in respect to their suits, will be scrutinized by the Court with great distrust. Lord Stowell declares, that negotiations with seamen, even before suit brought, are conducted more to the satisfaction of the Court, when entrusted to their proctors; (*The Frederick*, 1 *Hagg.* 211, 220;) thus distinctly implying that the Court may extend its *quasi* guardianship to their interests not in prosecution. And the authorities are clear to the point, that bargains to the disadvantage of seamen, in respect to their services and the wages due them, will not be regarded in Admiralty Courts, when unconscientious or overreaching in their bearing. There would be still greater reason, in a case presenting a clear ground for recovery, to withhold from them an unrestrained control over the rights of their proctors, which become blended with their own after suit instituted. Accordingly, the payment of a particular sum to a mariner out of Court, without the knowledge of his proctor, to settle a suit for wages in progress and prepared for decision, if sanctioned as a settlement of the cause so far as a recovery of the matter in demand was concerned, would still be re-

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garded by the Court as evidence against a claimant or respondent, different from what an offer of the same sum to prevent a suit would be. Such a payment does not wear the face of only purchasing peace or buying off the hazards of a law suit, but it is bidding against the greediness and ignorance of the seaman, after the respondent or claimant is aware of the strength of the seaman's case and of the weakness of his own. Coming in that shape, it may well be acted upon as an acknowledgment that the seaman was justly entitled to the full amount paid.

The transaction bears another aspect. If not explained on the part of the master or owner, the Court must consider a settlement so made to have been procured for the purpose of depriving the libellant's proctor of the legal costs accrued in the action. Those costs almost inevitably follow a recovery in a suit for wages. They, equally with the wages, are a lien on the vessel, from the moment she is attached. When the testimony before the Court indicates to the master or owner that the seamen must have a decree in their favor, he will be deemed, in procuring a settlement and release, to have employed the temptation of cash in hand, to influence needy and reckless parties to desert their suit and fraudulently throw the costs upon their own proctor.

At law, where costs are incident to the success of the suitor's claim or defence, and accordingly depend upon the final event of the litigation, a settlement between the parties is ordinarily held to extinguish all claims for costs on the part of the attorney of either, as against the other. (*Watson v. Depeyster*, 1 *Caines*, 66; *Johnston v. Brannan*, 5 *Johns.* 268; *The People v. Harden-*

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bergh, 8 *Johns.* 335; *Chapman v. Haw*, 1 *Taunt.* 341; *Graves v. Eades*, 5 *Id.* 429; *Charlwood v. Berridge*, 1 *Esp.* 345; *Nelson v. Wilson*, 6 *Bing.* 568.) But, even Courts of law will protect attorneys against settlements made collusively, with intent to destroy their remedies for costs, and even against those which are made after notice to pay costs to the attorney. (*Pinder v. Morris*, 3 *Caines*, 165; *Martin v. Hawks*, 15 *Johns.* 405; *Swain v. Senate*, 5 *Bos. & Pull.* 99; *Cole v. Bennett*, 6 *Price*, 15.) Slight circumstances are often regarded as competent proof of collusion—as that the party settled with has a good cause of action, and is irresponsible to satisfy his attorney's costs; or that there is an appearance of concealment in the settlement. In some instances, the English Courts have regarded the mere retainer of an attorney, where no arrest of the party had yet been made, as legal notice to the opposite party that the demand could only be settled with the attorney or on a satisfaction of his costs. (*Toms v. Powell*, 7 *East*, 536.) There must necessarily be much technicality mingling with the judgment of Courts of law in relation to costs as the concomitant of a suit. An attorney is, accordingly, not allowed to continue the suit, to recover his costs, after his client has discharged the action, unless fraud and collusion in the settlement render it nugatory.

Courts proceeding upon the principles of the civil law act upon broader doctrines. The charges a party sustains in contesting a suit are estimated with reference to all the equities brought to view, and are apportioned *ad libitum* by the Courts. In Chancery and in the Ecclesiastical Courts, costs are regarded as a distinct equity, though taking origin in and springing out of

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the general subject of controversy. The unsuccessful or litigious party, *pro salute animæ*, may undergo the penalty of costs, in correction of a disposition considered to be too grasping or refractory. Those Courts also regard the reality of rights and interests more than their technical name and aspect. Costs are treated as the distinct and exclusive right of the proctor, although nominally granted to the party. This right will be vigorously supported by the Courts, subject only to the general principles upon which costs are allowed or denied. The proctor's interests and those of his client are one in that respect only. When the right is settled, the interference of a party chargeable with costs, to dispossess the proctor of his remedy for them, would be grossly irregular. The Court of Admiralty proceeds upon analogous principles with other Courts which take jurisdiction conformably to the rules of the civil law, and imposes or withholds costs, in respect to parties, according to their fair merits and equities in relation to the subject matter of the litigation. And, in regard to the incidental interests of proctors, it does not consider its power, in this behalf, controlled by any compromise between the parties which does not appear *apud acta*. (*The Thomas Handford*, 2 Hagg. 61, note.)

To determine, therefore, the disposition of costs as between the parties, the Court must necessarily inform itself of their relative rights and liabilities, and examine the circumstances indicative of *bona fides* in the suitors, either in bringing the action or in defending it. The settlement now in question is marked by exceedingly suspicious traits. The suit had progressed almost to maturity. Large expenses were already incurred.

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The whole case of the libellant was known to the claimant. The libellant is a transient person, wholly irresponsible for the expenses, and it was accordingly manifest that they must be lost to the proctor if they were not obtained from the claimant by an award of costs, or secured in the damages decreed against him and recovered by the libellant. The libellant is an illiterate black man, alleged by the claimant to be disorderly and reckless. He is no doubt the kind of person with whom the proffer of ready money would be likely to have quick influence. It is not to be expected his avidity would be restrained by any concern for the rights of his proctor, and he may, withal, have been ready to unite in a trick upon his lawyer, without great concern as to its honesty. Under such circumstances, the claimant negotiated a secret settlement with him, paid him \$50 in cash, and took his release in full satisfaction of the cause of action. In this the claimant had the assistance of his own counsel, whilst the libellant acted without the presence of any legal adviser. This has the appearance of dealing separately with the libellant with intent to defeat a recovery of costs, and nothing would induce the Court to uphold a transaction so managed, short of evidence that the libellant had but a questionable ground of action, or that the claimant would be enabled to present a meritorious defence, so that the Court could pronounce the bargain a fair one for the libellant, and one which his proctor ought to have sanctioned, if consulted.

It is urged, accordingly, that the claimant furnishes at least *prima facie* evidence of a substantial defence on the merits. But the answer nowhere sets up a misconduct which could operate as a satisfaction of wages.

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It does not claim a forfeiture of them, and if, on a trial, it had been sustained throughout, it would only have exonerated the vessel from the libellant's claim for wages after his discharge at Rio Janeiro, but would in no way affect his right to a full recovery of wages up to that time. Wages were thus due the libellant for eight months, so that, after deducting the advances to him, a balance of \$100 would have been left, against which the answer sets up no payment. To this must be added two-thirds of the advance which the master is bound by statute to make on discharging a seaman in a foreign port. It accordingly results, that upon the pleadings and proofs before the Court, the libellant is entitled to recover a sum exceeding \$100, without regarding his claim for wages subsequent to the time he left the vessel. It is manifest, therefore, that the settlement was highly advantageous to the claimant, even if he is compelled to pay the costs of suit in addition to the compromise money. If he is released from paying costs, he makes a large saving, and has, in effect, succeeded in perpetrating a fraud on the libellant or his proctor.

It can hardly be supposed that, had the terms of compromise been referred to the Court, it would have sanctioned a settlement, in view of the pleadings and proofs before it, without also imposing costs. The equity with respect to costs, then, remains unaffected by the arrangement pleaded as a satisfaction and release. Conceding that a suitor has, in this Court, equally as at law, an abstract right to discharge from the lien for costs the thing or proceeds held under arrest, a proceeding like this, behind the back of the proctor, and

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operating to deprive him of his rights, could hardly be upheld in any tribunal.

As the libellant does not invoke the Court to relieve him from the bargain, as being unequal in respect to his rights, it will not be interfered with further than to declare that the settlement is no bar to the proctor's remedy for costs. But, as the proctor has unnecessarily made costs, by replying to the supplemental answer and noticing the cause upon the issue thus framed, the taxable costs arising from those proceedings must be allowed to the claimant as a set-off.

•Decree accordingly.

LEWIS GRANON vs. RICHARD T. HARTSHORNE.

In a suit for seamen's wages, the proctor for the libellant, though not legally incompetent as a witness for his client, has a bias which is to be regarded in weighing the credit to be given to his testimony.

A stipulation in the shipping articles, that the seamen shall not sue for wages until the vessel is unladen, is binding upon them, if it is fairly made.

Under such a stipulation, the libellant, in a suit for wages, has the burden of proving that the vessel was actually unladen when the libel was filed, or had then been moored fifteen days.

Where an action *in personam* for wages is brought prematurely, but becomes perfected before the stipulations and answer of the respondent are filed, and the answer, when filed, admits a right of action in the libellant, the Court need not dismiss the libel; yet, if the suit is vindictive or unreasonably prosecuted, costs may be imposed on the libellant.

The case of *The Cadmus*, (*ante*, p. 139,) considered.

The voyage ends when the vessel is safely moored at her port of final destination.

A stipulation in the shipping articles not to sue for wages until the vessel is unladen, is not an extension of the voyage; and, if a seaman leaves her, without permission, after she is moored, but before her unlivery, that is not a desertion which works a forfeiture of wages under the act of July 20th, 1790, (1 *U. S. Stat. at Large*, 131, 133.)

December 7th, 1834.

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THIS was a libel *in personam*, by a steward against the master, for wages. The vessel reached New-York harbor on the 14th of April, 1834, and got into her berth at the dock on the 15th. The libellant left her on the 16th, and on the 24th filed this libel. The answer admitted that \$42 remained unpaid on his wages, after deducting credits claimed, but set up, as a defence on the merits, that the libellant had forfeited his wages, by deserting the vessel at New-York. It also set up a dilatory exception, that the libellant's right of action had not matured when the suit was instituted, the vessel not being then unladen, and set forth an agreement in the shipping articles, signed by all the crew, that the mariners should not be entitled to wages until the vessel was unladen. The remaining facts are stated in the opinion of the Court.

Elijah Paine, for the libellant.

Thomas W. Tucker, for the respondent.

BETTS, J.—This suit has been contested on both sides with great acrimony, and at an expense disproportioned to the amount in dispute or the importance of the case. The action is prosecuted for the recovery of wages alleged to be earned and due on a voyage from New-York to Liverpool and back. The vessel was safely moored at her dock in New-York, on the 15th of April, having come into the harbor the day previous. This was her port of final destination and discharge. The result of the rather confused testimony on both sides is, that the crew, with the exception of the libellant and one other person, were paid off, and

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permitted by the master to leave the vessel on the 15th, the day she was brought into her berth; but it does not clearly appear that an express discharge was given to any one. The evidence is conflicting as to whether the master prohibited the libellant from leaving the vessel with the rest of the crew. The libellant's proctor offered himself as a witness to prove declarations or admissions by the respondent, which, it was urged, amounted to proof of his assent that the libellant might leave the ship when the others did. The evidence of the proctor was objected to as inadmissible; and, if it stood alone, it certainly would command but slender credit. No Court could receive it otherwise than with hesitancy and distrust. But, I do not find that the common law of England or of this country has declared an attorney an incompetent witness for his client in the particular suit in which he is acting as such attorney. This was the doctrine of the civil law—*mandatis, cavetur ut præsides attendant, ne patroni in causa cui patrocinium præstiterunt testimonium dicant*; (*Dig. lib. 22, tit. 5, § 25*;) and it is recognised in the French tribunals. Pothier asserts that, because of partiality, the testimony of an advocate or attorney is not admissible in favor of his client. (*Traité des Oblig. pt. 4, 827, tom. 3, p. 619.*) This might prove a wholesome rule of practice with the American Courts, as tending to maintain the dignity and purity of the administration of justice. But the relation is not classed, by standard writers, with the legal disqualifications of a witness; (1 *Gill. Law of Ev. 6th ed. 106 to 142*; 2 *Stark. Ev. Bost. ed. tit. Interested Witnesses*; *Bac. Ab. Ev. B.*; *Esp. N. P. pt. 3*;) and the objection is discountenanced by adjudications of high authority in the

United States. (*Brandigee v. Hale*, 13 *Johns.* 125; *Chaffee v. Thomas*, 7 *Cow.* 358; *Miles v. O'Hara*, 1 *Serg. & Rawle*, 32; *Reid v. Colcock*, 1 *Nott and McCord*, 592; *Phillips v. Bridge*, 11 *Mass.* 242.) In no way can such testimony be presented in a more exceptionable, not to say repulsive aspect, than in the present instance, where the statement of the master appears to have been drawn from him surreptitiously, as it were, by the contrivance and address of the proctor, with the intent, on his part, to volunteer as a witness to prove the declarations so obtained. The proctor testifies to answers to his interrogatories given by the respondent when under examination as a witness in another cause. It is not made to appear that the questions or answers were any way material in that case, nor that the attention of the respondent was drawn to the meaning put upon his statements by the attorney who examined him. A subtle and ambiguous interrogatory, propounded by an unscrupulous man, might entrap a party into statements to which the attorney could affix an import quite foreign from the intention and meaning of the witness. The temptation to practise such stratagems may be kept from reaching any member of the profession, if it becomes understood that he must be regarded in the position of a discredited witness, and can have no weight unless his testimony be supported. Admitting that the relation of a proctor to his client and the cause, and the slight chance of his securing a remuneration from a common sailor for services and advances in his suit otherwise than by securing a judgment against the other party, do not amount to a fixed pecuniary interest in the event of the cause, which disqualifies him from testifying for his

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client, still, the bias is so manifest and pressing, that small confidence can be placed in his representation or interpretation of declarations of the opposite party, either overheard or sought for and wormed out by him. The Court is often pained to see petty actions taken up and managed by proctors with a rancorous and over-reaching spirit, fully in keeping with that manifested by their clients; and, in order that this disposition may not be inflamed by mingling the proctor's evidence in the proceedings, I am anxious it should be understood, that the unsupported testimony of a proctor for his client weighs very lightly in this Court, and that the practice, on the part of proctors, of supporting, by their own evidence, cases they are conducting professionally, will be discountenanced by every means compatible with the law. In the present instance, the testimony of the proctor might be regarded as being corroborated by the facts, that the master paid wages to the other seamen and allowed them to leave the vessel, and that it does not appear there remained any ship's duty for the libellant to perform when he absented himself. In such case, it would be reasonable to imply that he was tacitly included in the permission to quit the vessel. The fact of a discharge need not be proved by any direct evidence, but may be inferred from circumstances; and, ordinarily, the payment of the other seamen, or permission to them to leave the vessel, will be regarded as a general discharge of the crew. (*Edwards v. The Susan*, 1 *Pet. Adm. Dec.* 167; *Dixon v. The Cyrus*, 2 *Id.* 407.) The presumption is, however, overborne, in the present case, by the testimony of the mates, who swear that the master refused to allow the libellant to go with the other men, and

was not present at the time he departed after they had left.

The stipulation in the shipping articles, postponing the right to wages until the vessel was unladen, cannot be pronounced unconscientious or circumventing in respect to the sailors. It has an immediate connection with their ordinary engagement to the vessel, and operates, in effect, but as a prolongation of their shipping term, and, as an incident thereto, delays the recovery of their wages until the vessel is unladen, or until the fifteen days allowed by the statute for that purpose have expired. (*The Martha, ante*, p. 151.) Such a stipulation would probably not operate to their loss or disadvantage, for they might insist on remaining with the vessel during the time, and would thus be entitled to support and wages until its expiration.

The weight of evidence being, that the libellant was not discharged from the vessel, he was bound by the stipulation in the articles; and, as the libel was filed only nine days after the voyage was ended, the exception taken in the answer to the libellant's present right of action, becomes technically well founded. If this objection was supported by any show of reason for exacting from the libellant the delay of his suit, the respondent might, upon the strength of it, be entitled to turn him out of Court, with costs. But the answer does not allege, nor does the proof show, that the master claimed any duty of the libellant on ship-board, or that the vessel required his services. The refusal to him of permission to go with the crew would, therefore, seem to have been arbitrary on the part of the master, and was probably vindictive and designed to coerce the libellant to pursue some course resisted by him, or to lead him to commit some

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act prejudicial to the ultimate recovery of his wages. The latter motive is inferable from the attempt of the master to fasten a forfeiture of wages on the libellant because of his leaving the vessel; and there is evidence in this case that the master was willing to consent to the libellant's leaving the ship upon condition that he would execute a release of all causes of action against him. This conduct of the master takes from him all claim to the favor of the Court. He is entitled to the strict legal effect of his exceptions, and to nothing more.

The libellant only proves that the vessel was in process of unlading when his libel was filed. The respondent does not assert that she remained unladen when his answer was put in. If that was the fact, yet fifteen days had then elapsed, and it will be presumed, in the absence of clear proof to the contrary, that there was ample time, in that period, to discharge the cargo. (*The Martha*, ante, p. 151.) When the respondent, then, submits himself to the jurisdiction of the Court, as he does by his stipulations and answer, and admits, in his answer, that a balance of wages is due the libellant, the Court is relieved from the necessity of decreeing a dismissal of the suit and compelling the libellant to renew his action. It is clearly competent to an Admiralty Court, and it is believed to be a usual course of procedure in that tribunal, to act upon the merits of the case as it stands when the cause comes to contestation. (See *The Edward*, ante, p. 286.) To preserve order in its proceedings, and due respect to the rights of the suitors who are subject to its process, it will undoubtedly, by awarding or withholding costs, or by a summary discharge of the action, check the irregularity

of commencing suits before the right of action is fully matured. To do that effectually, it is not necessary to surcease the consideration of the merits, when they are placed in issue upon the pleadings, and to turn the promovent out of Court, merely to compel him to perform the ceremony of beginning his suit in due time. If, then, the question rested upon the fact that, on a peremptory refusal by the master to pay the wages which he admitted to be earned, the libellant unadvisedly and erroneously brought his action therefor nine days after the voyage was ended, when he ought to have delayed it six days longer, it would seem to be fit and appropriate, when the fifteen days have run out, or the cargo is unladen, to allow the action to proceed, as no wrong would be sustained by the respondent. And, ordinarily, this would be permitted without imposing costs because of an irregularity, merely technical, in commencing the action. The respondent, however, having given evidence that, after the libel was filed, but before the vessel was unladen or the fifteen days had expired, he offered to pay the wages, and that the proctor for the libellant refused to accept them because his libel was already filed, entitles himself to an indemnity against the costs or the injury which he may have incurred because of the captiousness or precipitancy of the party in urging forward the action. Had application then been made by the respondent, to be discharged from the action, the Court would no doubt have stopped the proceedings, with costs to him. But, since he elected to file stipulations *sistere in judicio et solvere judicium*, and to interpose a full defence by formal answer, after the fault was known to him, the irregularity in commencing the suit

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may be regarded as substantially waived, and the case be acted upon as if it was instituted at the time the defence was taken. Accordingly, the only redress the respondent can reasonably claim, is to be relieved of the costs improperly created previously to his offer to satisfy the demand. Those costs will be imposed upon the libellant.

The merits of the defence made by the answer are, that the libellant has forfeited his entire wages by desertion; and the respondent insists that the decision of the Circuit Court in the case of *The Cadmus*, (*ante*, p. 139,) has settled the law upon this point in his favor, and determined that every unauthorized abandonment of a vessel by a seaman is a desertion which necessarily works a forfeiture of wages. That case, as adjudged by the Circuit Court, must, until reversed by the Supreme Court, supply the rule of decision to this Court. I am not in possession of the reasons upon which that judgment was based, but I am persuaded that the learned judge did not, as was urged on this argument, intend to abrogate the rule of the law maritime in respect to the constituents or consequences of the offence of desertion, nor to hold that every wilful and clandestine departure from a vessel by a seaman, proved by oral evidence alone, is the offence of desertion described in the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 131, 133,) and must incur the punishment therein prescribed. On the contrary, I conceive that Admiralty Courts can exercise a discretion in the punishment of the common law offence, so to term it, and are not obliged to impose the single penalty of forfeiture of wages and effects. (See *The Cadmus*, *ante*, p. 139; *The Martha*, *ante*, p. 151; *The*

Elizabeth Frith, ante, p. 195.) The cases are clear to show that maritime Courts have always claimed and exercised the power to graduate the abstraction or forfeiture of wages conformably to the character of the fault, and have never felt constrained to levy the absolute and extreme decree of entire confiscation for every wrongful abandonment of a vessel by seamen.

But, whatever may be the rule where the act is committed before the vessel arrives at her port of final discharge, the voyage, in this instance, had been already fully performed. The ship had reached her port of final destination, and was safely moored at her berth. This terminated the voyage and all sea services on board connected therewith. Such has been the rule in this Court, and such, it is believed, is the sound interpretation of the law maritime. (*The Martha*, ante, p. 151; *The Cadmus*, ante, p. 139; *Brown v. Jones*, 2 Gall. 479.) The engagement to serve upon a vessel in port is not a contract maritime in its character, or clothed with the privileges or liabilities of one, without the element of being connected with a sea service; much less can it be claimed as appertaining to a past voyage. It is matter of personal agreement, and no more becomes part of the contract for the voyage, by being inserted in the shipping articles, than if it were made outside of that agreement. It is a common practice to engage mates, carpenters, and probably cooks and stewards, to remain with a vessel after the voyage for which they ship is terminated, pending her being repaired, or her relading, or her seeking a new voyage; and this duty may be incident to their shipping contract. (*The Baltic Merchant*, Edw. R. 86.) But there is no case intimating that their

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non-fulfilment of such subsidiary agreement will cause the forfeiture of their earnings during the concluded voyage.

The respondent relies upon parol proof alone to establish the desertion charged. He produces no entry in his log-book, nor does he attempt to show that the act of the libellant was entered there, or that it was complained of at the time as a fault. Indeed, it would appear, from the scope of the proofs, that no person was proposed to be retained in the vessel other than the libellant. Under these circumstances, the fault committed by him would be regarded as of the most venial character, and as justifying but a very moderate fine, if the respondent had made it appear that he was in earnest in refusing the man a discharge. But I am satisfied he was actuated by the purpose of obtaining from him a release or acquittance of the vessel or her officers from some prosecution threatened by the libellant, and by no desire to hold him to the contract set up. The subsequent offer by the master to pay the libellant's wages, imports that he was conscious he was acting unjustly and oppressively towards the libellant in withholding them and in endeavoring to exact a release from him. In my opinion, no legal cause is shown for claiming a forfeiture of the wages, and I shall decree that the libellant recover them in full. A reference may be had to the clerk, to ascertain the amount justly due.

But for the offer to pay the wages, made by the respondent, in apparent good faith, before the suit was instituted, I should order each party to pay his own costs. But, as the libellant was irregular in bringing his suit in violation of his contract, and refused to

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accept his wages without litigation, I shall decree full costs to the respondent. The taxed bill is to be deducted from the amount of wages reported due, and the balance, if any, is to be paid to the libellant.

Decree accordingly.

THE HENRY.

A sale of a vessel by a master, *virtute officii*, for the benefit of all concerned, is not conclusive, but may be reviewed in Admiralty, and the burden of proof will be on the purchaser to show, as against the former owner, that the sale was both *bona fide* and necessary.

The meaning of the term *necessary*, examined.

It seems that, in respect to the validity of such a sale by the master, the rule is the same, whether the question arises between the owner and the purchaser, or between the insured and the underwriter.

A survey of the vessel, under oath, prior to the sale, if not indispensable, is highly important as evidence to show the necessity and good faith of the sale.

A paper purporting to be a survey, but not drawn up, subscribed or sworn to prior to the sale, will not be received as evidence of a survey.

The facility with which a stranded vessel was reclaimed by the purchaser, after the sale of her by her master, is evidence in regard to the good faith of the master and the necessity of the sale.

A special agent must act in the name of his principal, and according to the terms of the authority conferred upon him.

The mere presence of an agent of the owner of the vessel, at the sale of her by her master, does not constitute the sale any the less a sale by the master.

Evidence of the receipt, by a special agent of the owner of a vessel, of the proceeds of an unauthorized sale of the vessel by her master, does not afford a presumption that the sale was ratified by the owner.

Where, in the case of an unauthorized sale of a vessel by her master, in a foreign port, restitution of the vessel, or the amount of her value on her arrival home, is decreed to her former owner, the purchaser at such sale will be allowed the amount of the necessary repairs put upon the vessel to fit her for sea, and the expenses of navigating her home, and the price paid for her, on such sale, to the agent of the owner.

The right to the freight earned upon the homeward voyage follows the ownership of the vessel.

The Henry.

The bills of lading are only *prima facie* evidence of the amount of cargo upon which freight is to be estimated.

Repairs and betterments put upon the vessel in her home port by the purchaser, before notice of the former owner's claim, will be allowed to the purchaser out of the proceeds of the vessel, if any remain after the other accounts are adjusted.

December 31st, 1834.

THIS was a possessory action. The libellants were owners of the brig Henry, and, in April, 1832, despatched her to Matamoros, in Mexico, with Daniel Moss as master, and Jason St. John as supercargo and agent, giving a power of attorney to St. John "to employ the vessel, or to make sale of her, in the name, place and stead of the libellants, in case a fair price could be obtained." Moss was unable, from sickness, to return with the vessel, and one Titterton was substituted as master in his place. In getting out of the harbor of Matamoros the vessel ran ashore and was stranded upon a sand-bank. There was a great deal of evidence on both sides as to the degree of danger to which she was exposed, similar cases of vessels grounding in that vicinity were adduced, and it was proved that Titterton himself had before been wrecked on that coast. The master abandoned the vessel the same day she ran aground, and ordered her to be sold in three days. A paper was put in evidence in the case, signed by three ship-masters at Rio Grande, and verified before the United States Consul at Matamoros, in these words: "At the instance of William Titterton, master, we went on board the hermaphrodite brig Henry, of New-York, to examine the said vessel, and, having carefully and particularly inspected, examined and surveyed the said brig, report her to be stranded and bilged, with a great quantity of water, and unfit

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to be got off, and, therefore, we recommend the said brig to be sold for the benefit of the concerned." This paper was dated the 5th of July, and sworn to on the 7th, which was the day of the sale; and there was evidence that it was not subscribed or sworn to until after the sale. The brig was sold at auction. The master superintended the sale. St. John was present, and made no objection to it. One Irwin bought the vessel for \$80, and sold her again, for the same sum, to the vendor of the claimants. The purchase-money for the brig was received by St. John, but it did not appear whether he had ever paid it over to the libellants. Eleven days after the sale, the vessel was got off, and was discovered to be not materially damaged. Such repairs as were necessary for her preservation were put upon her at Matamoros, and she arrived at New-York in October, 1832, with the same cargo which she had on board when she ran aground. She was sold to the claimants at New-York, and was by them put upon the railway to be repaired.

The libel was filed in January, 1833, and prayed that the vessel, or her value, and the freight earned, might be decreed to the libellants. The claimants accepted to the jurisdiction of the Court, and prayed restitution of the vessel and freight. She was afterwards bonded by the claimants, on an agreed valuation of \$3,500.

It was contended by the libellants that the sale was invalid, and that no title passed by it. The claimants urged, that the master had, under the circumstances, competent authority to sell the vessel, and that the sale was valid; that, as St. John, the agent of the libellants to sell the vessel, had concurred with the master

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in the sale, it had the same effect as if he himself had made the sale; and that the receipt of the purchase-money by the agent of the libellants amounted to a ratification of the sale. The authorities and the arguments are fully considered in the opinion of the Court.

John Duer and William Kent, for the libellants.

George Griffin, James W. Gerard and Benjamin Haight, for the claimants.

BETTS, J.—The libellants in this case produce a complete documentary title in themselves to the brig Henry, which entitles them to prevail, unless the claimants can show a paramount title out of them, or derive one through them. The title of the claimants rests upon a sale of the vessel, by the master, in the port of Matamoras, and it devolves on them to establish the validity of the sale, and the sufficiency of their title under it.

The master of a vessel has complete authority in every thing relating to the management and conduct of his vessel; but it is apparent that no general authority from his owners to sell her can be implied. When, therefore, a master first assumed the power to sell his ship, *virtute officii*, under any exigency whatever, the English Courts denied his authority, and refused to recognise the validity of the title thus acquired; (*Tremenhere v. Tresillian*, 1 *Siderf.* 452; *Johnson v. Shippen*, 2 *Ld. Raym.* 982;) and these views received the approbation of the Court at a much later period, (*Reid v. Darby*, 10 *East*, 143; *Hunter v. Prinsep*, *Id.* 378,) although some *nisi prius* cases before Lord Ellen-

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borough seem to import a yielding of the general principle. (*Hayman v. Molton*, 5 Esp. 65; *Underwood v. Robertson*, 4 Campb. 138.) The rule has now been relaxed, or has assumed a new form, so that it is admitted in England that the master may, by the maritime law, sell his vessel in case of wreck or irreparable disaster. (*The Fanny and Elmira*, Edw. R. 117; *Maeburn v. Leckie*, cited in *Abbott on Shipp. ed.* 1829, p. 6; *Cannan v. Meaburn*, 1 Bingh. 243; *Idle v. Royal Exch. Ass. Co.* 8 Taunt. 755; *Read v. Bonham*, 3 Brod. & Bingh. 147; *Freeman v. The E. Ind. Co.* 5 Barn. & Ald. 617.) And the law of England conforms, in this respect, to that of other maritime countries. (*Pardessus, Cours de Droit Comm. pt. 4, tit. 1, ch. 3, sec. 2*; 1 *Emerig. on Ins. tit. Innavigability*; *Valin, Comm. Sur. l'Ordonnance, liv. 2, tit. 1, art. 19, and liv. 3, tit. 6, art. 46*; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; 3 *Kent's Comm.* 173, note.) But the qualifications attached to the power manifest the caution and distrust with which its admission was ultimately yielded by the Courts. The cases demand the existence of an extraordinary and paramount necessity to justify a sale, and refuse to uphold it unless it is resorted to only in the last extremity.

The American and English cases coincide in one rule, as applicable to this subject. The master's agency to sell, arising by operation of law and being exercised by him *virtute officii*, both necessity and good faith must concur, to render the sale by him valid. (*Abbott on Shipp. ed.* 1829, 10, 244 n.; *Reid v. Darby*, 10 East, 143; *Hayman v. Molton*, 5 Esp. 65; *Underwood v. Robertson*, 4 Campb. 138; *The Fanny and Elmira*, Edw. R. 117; 3 *Kent's Comm.* 173, n.; *The Schooner*

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Tilton, 5 *Mas.* 465, 476; *Hall v. Franklin Ins. Co.* 9 *Pick.* 466; *Am. Ins. Co. v. Center*, 4 *Wend.* 45; *Center v. American Ins. Co.* 7 *Cow.* 564, 582; *Patapsco Ins. Co. v. Southgate*, 5 *Pet.* 604, 621.) Neither necessity nor good faith is alone sufficient to make valid a sale by the master which is offered as a bar to the title of the previous owner. Both must concur, and must be affirmatively shown by the party setting up the sale; and the Courts will not infer the existence of either of these requisites from the most ample proof of the other. Chancellor Kent expresses the rule deducible from the authorities to be, that if the voyage be broken up in the course of it by ungovernable circumstances, the master may sell the ship, provided he do so in good faith, for the good of all concerned, and in a case of supreme necessity which sweeps all ordinary rules before it; (3 *Kent's Comm.* 173;) and the spirit of this statement of the master's authority is supported by the Supreme Court of the United States. (*Patapsco Ins. Co. v. Southgate*, 5 *Pet.* 621.)

This term *necessity*, which at the same time creates the power and marks its limitation, is not itself of any very distinct or definite signification. The epithets annexed to it as qualifications, in most of the cases, indicate the anxiety of the Courts to restrain the power within severe limits, but do not assist in removing the vagueness and uncertainty of the term itself. What test is the Court to employ in determining when, in point of law, this necessity becomes *absolute*, *paramount* or *extreme*? Practically, these epithets serve only to administer an impressive caution to Courts and jurors, to demand clear proof that the necessity is *actual* and not merely apprehended or one which, upon a balance-

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ing of chances, may turn out to be absolute and real, or only threatening and imaginary. The tribunal which passes upon the facts must determine, upon its own best judgment, in view of all the evidence, whether the necessity was actual and justified the sale, because the principles applicable to the subject do not, from their nature, admit of any more precise standard. The qualifying phrases which the books annex to the rule can only avail as appeals to the sound discretion of the Court or of jurors, in a given case, and not as of themselves presenting any distinct particular to be ascertained, or as affording any definite or practical limitation to the power. Wherever an actual necessity exists, the power is conferred, equally when that necessity presents itself in its simplest form, and when it is most imminent. Some cases seem to incline towards taking a distinction between sales which are to be deemed operative between insurer and insured, and those which are to conclude the owner as against the purchaser. (*The Schooner Tilton*, 5 *Mass.* 465, 475, 476; *Center v. The American Ins. Co.* 7 *Cow.* 577, 582; *Idle v. The Royal Exchange Ass. Co.* 8 *Taunt.* 755; *Holt on Shipp.* 2d ed. 250.) It is not necessary to the decision of this case, that I should pass upon the solidity of this distinction; but I am persuaded that principle and authority are opposed to any further relaxation of the rule, and that the same necessity and good faith which are required when the question arises between the owner and the master or purchaser, must exist to give validity to the sale as between the underwriter and the insured. So far as the case of *Center v. The American Ins. Co.* (7 *Cow.* 582, and 4 *Wend.* 45) indicates a different principle, it may be considered as

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controlled by the decision in *Patapsco Ins. Co. v. Southgate*, (5 *Pet.* 621.)

The law has not settled what precise mode or degree of evidence is sufficient to prove the existence of the necessity which is thus made the first requisite to the validity of all sales of a vessel by her master. The judgment and determination of the master himself, no matter how careful his consideration of the circumstances of the case may have been, is manifestly not conclusive upon the subject. His decision is subject to review in the home tribunals, and he or the party who claims under his acts must sustain that decision. Nor is the opinion of bystanders, however intelligent, disinterested and unanimous they may be, adequate proof of the accuracy of the decision. The law adheres to the ordinary rules of evidence in this matter, and requires proof of the facts and circumstances themselves in view of which the master decided, in order to a determination whether his decision was correct. The wise precaution of the maritime law has, however, pointed to one item of proof, which, if not necessary, will, nevertheless, be demanded, unless its absence be satisfactorily accounted for; and that is, a precedent examination of the vessel by competent surveyors, and their report, stating her condition, and advising a sale. (*Gordon v. Mass. Ins. Co.* 2 *Pick.* 249; *The Schooner Tilton*, 5 *Mas.* 490; *Cort v. The Delaware Ins. Co.* 2 *Wash. C. C. R.* 377; *Fontaine v. The Phoenix Ins. Co.* 11 *Johns.* 293; *Royal Ins. Co. v. Idle*, 8 *Taunt.* 755.) Such a survey answers the salutary purpose of checking precipitation on the part of the master under circumstances well calculated to disturb his judgment, and gives him authentic evidence to guide him in de-

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termining whether the condition of his vessel be desperate or not. He is by no means bound to adopt the opinion of the surveyors advising a sale, nor, if he does follow it, will it, of itself, justify his proceeding to a sale. (*Hayman v. Molton*, 5 *Esp.* 65; *Abbott on Shipp.* ed. 1829, 8 to 11.) Still, a survey by competent surveyors, containing a clear statement of the injury, and a strong recommendation to sell, will be an important element in the proofs, in determining the character of the emergency and especially the good faith of the master. (*The Fanny and Elmira*, *Edw. R.* 117; *The Schooner Tilton*, 5 *Mas.* 465; *Gordon v. Mass. Ins. Co.* 2 *Pick.* 264.) Independently of all authority on the point, the use the survey is to subserve plainly indicates, that it should be deliberately made and should precede the action of the master. It is not intended to be laid down as a fixed rule, that the surveyors must be sworn before they proceed to act. Still, it will add greater weight and credibility to their decision, if all their examinations and consultations are under the solemnity of an oath. At all events, when their report is submitted to the master and he proceeds to act upon its testimony, it should have the sanction of the oaths of the surveyors, if they can be legally administered at the place of the survey.

In view of these principles, the survey offered in evidence in this case is substantially defective in every particular necessary to constitute it a safe or proper guide to the decision of the master. It would have been easy for him to have called together persons competent and properly qualified to make a survey, and to have had their proceedings duly authenticated. But the evidence shows, that the paper offered here as

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a survey was not subscribed or sworn to until after the master had concluded to sell, and probably not until after the sale had actually taken place. Moreover, it appears upon the evidence, that the persons who signed the paper were not called to the vessel to act as surveyors; nor did they make any joint examination of her, nor did they ever consult together with a view to a report, nor did they all individually inspect her in a way to enable them to form a sound opinion as to her condition. If, then, in circumstances like the present, where there is no impediment in the way of a competent survey of the vessel, either from the want of surveyors or from the imminency of the peril, a master cannot legally proceed to sell his vessel without instituting such a survey, it follows that Titterton exceeded the bounds of his authority, and the claimants, who makes title under his sale, must fail in consequence.

But, even if a master may, on his own judgment of the exigency of the case, sell a vessel, without regard to a survey, it cannot be denied that this power is not absolute, but is subject to review, when those whose interests have been affected by his acts sue before the proper tribunal to reclaim their rights. It will then devolve upon the party who upholds the proceedings of the master, to prove the circumstances necessary to confer the power, and the faithful execution of the power so created. Without recapitulating the evidence in this case, it is enough to say, that the master did not attempt those exertions to save the vessel which he was bound to make. He gave her up as hopeless as soon as she stranded, before the injuries sustained could have been understood, and without making reasonable efforts to ascertain them. He presumed

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she had bilged, but had no adequate reasons for that conclusion. The average experience in respect to vessels grounding in that vicinity may have been, that they could not be got off, and this the master may have been aware of, from having been familiar with the coast, and from having been once previously wrecked there himself. But he cannot be excused because the circumstances were discouraging, for not having made earnest efforts to save his vessel. Besides, two cases could hardly occur of vessels grounding under precisely similar circumstances. The wind, the currents and tides, the force of striking, the weight of the vessels and other circumstances, would always present distinctions which would prevent one case from offering a rule of conduct applicable in all respects to another.

The evidence does not mark this as a case of extreme necessity. The vessel was very strong, and lay upon a sandy bottom, so soft that the chief danger apprehended seemed to be, that she would gradually become imbedded in the sand. The state of the wind was not such as to expose her to instant peril; and there were several American merchant vessels in the vicinity, and an American armed ship anchored a few miles off. She struck, moreover, at the edge of the harbor, from which she had just cleared. Her lading was got off in a few hours, and then, without an endeavor to procure relief or assistance from the shore or from neighboring vessels, the master gave her up as desperate, and ordered her sale in three days. Eleven days after the sale, the purchaser, with the application of ordinary means, raised the vessel, and she was then found not to have received any fatal injury. It is true, that this result is not to be considered conclusive as to the

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propriety of the conduct of the master. (*Idle v. The Royal Exchange Ass. Co.* 8 Taunt. 755; *Fontaine v. The Phoenix Ins. Co.* 11 Johns. 295.) A sale is not to be invalidated merely because the vessel is afterwards rescued. The case is to be judged of by the circumstances as they must have appeared at the time, and not by the subsequent event. Still, the result is an element in the evidence, to assist in determining whether the condition of the vessel ought reasonably, at the time, to have been deemed hopeless, and may, in this manner, become a circumstance of weight in deciding whether the master acted in good faith to his employers. So far, then, as the validity of the sale under which the claimants make title rests upon the authority of the master to sell, I must, under the facts in proof, hold that they have failed to show that junction of necessity and good faith, by which alone such authority can be established.

It is next contended by the claimants, that since the supercargo, with a power of attorney from the owners to sell the vessel, was present and assented to the sale in question, his acts in relation to the sale constitute it, in point of law, a sale under the power, and that, accordingly, the claimants derive a complete title in that manner, without regard to the authority or acts of the master. If the supercargo had sold, he would have done so under no authority arising by operation of law. The master sold *virtute officii*, in his own name, as clothed with the possession of the article, and with the power to sell *pro hac vice*, and not by the direct act or assent of the owner, but by authorization of law. The supercargo, however, would have acted as a mere agent for his principal and in his principal's

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name. Passing by the question, whether a vessel can be sold by an agent, so as to pass a title good against her former owner, without the ordinary evidence of a bill of sale for and in the name of the principal, or, whether a sale and delivery of a vessel, without a bill of sale, are good only between the owner and the purchaser *personally*, (3 *Kent's Comm.* 130, *n.* ; *Abbott on Shipp.* *ed.* 1829, 1 ; *The Schooner Tilton*, 5 *Mas.* 481 ; *Ohl v. The Eagle Ins. Co.* 4 *Mas.* 390 ; *The Sisters*, 5 *Rob.* 155 ; *Holt on Shipp.* 183 ; *Jacobsen's Sea Laws*, 17, 57,) I am satisfied, upon the proofs, that the master himself assumed the power to sell, and proceeded to carry it into execution, without referring to any authority of the agent of the owners. It is not claimed that the sale was made directly by the agent, but only that the master and auctioneer sold with his implied sanction, he being present and acquiescing in the act. Upon this question, the case of *Idle v. The Royal Exchange Ass. Co.* (8 *Taunt.* 755,) is in point. In that case, one of the owners of a ship was present at its sale by the master, and assented to the sale. Dallas, C. J., says, it was no less a sale by the master because one of the owners was present on the spot and concurred in it. Moreover, the power of attorney, in the present case, gave authority to sell "in case a fair price could be obtained," evidently with a view solely to the exercise of the power in a market or under circumstances where the price might be the subject of negotiation and election. The supercargo was manifestly a special agent, with a limited trust, and could dispose of the property only while acting strictly within the limits of the authority conferred. His presence, therefore, at the sale by the master, or even

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his assent or advice to that sale, does not constitute it a sale by him under his power of attorney from the owners.

The claimants contend, however, that as the proceeds of the sale were paid to the supercargo, the Court will intend that he paid them over to the libellants, and that the receipt of the money by the libellants implies a ratification of the sale on their part. A ratification by a principal of an act of an agent, after that act is performed, is, in its legal effect, the same as a precedent authorization to the agent; and the ratification may be either in the form of an express assent, or be implied by law from the absence of any dissent. The rule is, that where the act is done by one party, in the name of and affecting another, without his direct authority, there, if the latter does not, within a reasonable time after notice of the act, dissent therefrom, his assent and ratification will be presumed. (2 *Kent's Comm.* 616, and cases cited; *Richmond Mfg. Co. v. Starks*, 4 *Mas.* 296.) To constitute a ratification, however, it is obviously necessary that the act supposed to be ratified by the principal should itself be the act of the agent. It has been already seen, that a master who assumes to sell a ship, does so *virtute officii*, by authorization of law, and not as agent of the owner; or that, if, in this instance, the master assumed to act as agent of the owners, the circumstances, as they appear in evidence, did not confer upon him authority to sell, and that the sale was actually made by him without the participation of the supercargo. Admitting, therefore, that the libellants received the money from the supercargo, the claimants should, in order to establish a ratification of the sale, and bind the owners to its confirmation, have

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shown that the supercargo had directed the sale, or had at least received the purchase money as the vendor of the ship, knowing all the circumstances of her sale, and intending to confirm that disposition of her, in so far as he was capable of doing it, and that the libellants also knew of the facts, and received the money with similar intentions, expressed or implied. Those facts being established, ground would be laid for the inquiry, whether a disposal of property by an agent, without following the directions of his principal, and the receipt of the consideration money by the principal, without objection, do not conclude the principal from denying the validity of the act of the agent. (*Paley on Ag.* 145, 249.) As the evidence stands, however, there seems to have been no affirmative act on the part of the agent, promoting or confirming the sale. He is to be regarded as having been a mere involuntary depository of the money for the benefit of the lawful owner, rather than as having acquired it in the character of vendor of the vessel. The sale, therefore, which the principals are supposed to have ratified, cannot be deemed the act of the agent.

A further and controlling objection to applying the principle of subsequent ratification to this case is, that no proof is given that the libellants ever actually received the consideration money. This must be brought directly home to them, and no inference, controlling their interests, can be deduced from the circumstance of the payment to St. John of the price of the sale. It may yet remain in the hands of St. John, or, if passed over to the libellants, it may have been received by them under circumstances which leave their rights unimpaired by its receipt. The Court will not intend,

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from the fact that it went into St. John's hands, that the libellants received it without reservation or qualification, or, indeed, that they received it at all.

The prior title of the libellants must, therefore, prevail in this action, and they are entitled, upon the strength of it, to a restoration of the vessel or to her proceeds. The point then arises, whether they can recover her in the condition in which she was found when arrested in this action, or whether she is equitably chargeable with disbursements made in raising and repairing her abroad, and with the expenses she has incurred in the hands of the claimants since her arrival in this port.

The title of the claimants in the present case is invalid, upon legal objections. There is, in my judgment, no evidence establishing any fraudulent or improper participation, on the part of the purchaser, in procuring the sale or in buying at it. It is true, that he who takes an illegal title takes it at his peril; but, it has been held in the English Court of Admiralty, that where such title is not notoriously bad, the purchaser need not, in favor of the legal owner, be deprived of all remuneration for actual betterments put upon the property purchased. (*The Perseverance*, 2 Rob. 239.) The decree of restitution, in this case, proceeds upon the ground that the right of the original owner has not been divested, and not on the imputation of any improper act of the purchaser. However fair his conduct may have been, and notwithstanding he may have bought in entire ignorance of any defect in the proceedings or want of authority for the sale, the legal title remains in the libellants, and, upon that, restoration is awarded. There is, however, a manifest equity in

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requiring the owners to reimburse the expenses which were necessary to enable them to recover or enjoy their property. The purchaser was under no obligation to reclaim their vessel. He might have abandoned it, without incurring any responsibility to them; and, in that case, their property would have been an utter loss. Their master and supercargo assumed no further interest in the matter, but relinquished the vessel to the purchaser, as upon a valid sale. The libellants are, therefore, bound to remunerate those who rescued the wreck, for all indispensable expenditures bestowed upon the vessel in getting her off, and in so repairing her as to make her seaworthy. The English Admiralty has relieved the purchaser in regard to betterments put by him on the vessel, under circumstances of less urgent equity. (*The Perseverance*, 2 Rob. 239; *The Kierlighett*, 3 Rob. 96; *The Nostra de Conceicas*, 5 Rob. 263.) The relief should be confined, however, to repairs to the hull of the vessel, and to the purchase of such tackle and apparel as did not before belong to her and were indispensable to her safe navigation. All the old equipments remained the property of the libellants, and, although the purchaser of the vessel may have purchased them of others who had bought them at the sale, his right so acquired must yield to the elder and paramount title of the owners.

The next consideration is the one respecting the repairs made in this port. These cannot be considered as indispensable to the preservation of the vessel, and were, it would seem, of a much more expensive character than was necessary for her safe and profitable employment. If they were put on by the claimants after notice of the libellants' claim of property, and

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without their assent, they would, in strictness of law, be at the hazard of the claimants. The testimony is singularly deficient on this point. If the libellants, knowing of the arrival of the vessel at this port, and of her refitment, kept back their claim until the expenditures were completed, they committed a fraud on the claimants, and this Court would compel the satisfaction of all disbursements chargeable to the claimants for such repairs. In the absence of evidence on either side, the inference on this point must be, that the vessel lay in port without the knowledge of the libellants, and that the claimants made the repairs in good faith, and under the persuasion that they were the legal owners. As any allowance in the case is made upon considerations of equity, the Court is bound not to suffer the equities of the innocent purchaser to merge and annihilate the equities of the real owner. The possessor of the vessel, by whatever good faith he was actuated, ought not to be allowed to burden the owner with bills for repairs which were in no way necessary to enable him to acquire the possession and use of his vessel, and to an amount which would absorb and extinguish his actual interest in her. The claimants allege that the vessel was worth, on her arrival here, but \$700, and that they expended \$2,260 65 in her refitment, and they also offer proof that she sold, after being so repaired, for \$2,500. To charge all these disbursements upon the vessel, would extinguish nearly the entire interest of the real owners. On the other hand, if the repairs augmented the available value of the vessel, the owners ought not to reap that advantage at the expense of the innocent purchasers.

The rule which the Court adopts is, to allow the

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libellants the full value of the vessel on her arrival in this port, deducting, as before stated, the amount of expenditure reasonably necessary to raise her, repair her bottom and fit her for sea, and deducting also the amount of disbursements, at their fair value at the port of refitment, for the tackle and apparel she had on board when she was seized by the libellants, which did not belong to her when she stranded; and to allow to the claimants all that it may be proved their repairs increased her value between what she was worth when she arrived and her fair value at the time she was restored to them on their bond, subject to such determination as to costs as may be made on the final disposal of the whole case. As the vessel was bonded by the claimants after her arrest in this cause, and was delivered up to them on an agreed valuation of \$3,500, the amount to be recovered by the libellants cannot exceed that sum, whatever may have been the value of the vessel on her arrival.

The prayer of the libel also asks, that the earnings of the vessel on her return voyage may be decreed to the libellants. It is not stated in any of the pleadings, nor is it shown by the proofs, what freight was earned, and the Court would not be able to make any specific decree on that subject. Nor has the point been discussed by the counsel on either side. The general right to freight, as a consequence from the decree adjudging the ownership to be in the libellants, would probably not be controverted; and the case, as it has been presented to me, does not require me to decide whether freight can be recovered in this form of action, as an incident to the main subject matter of the decree. I shall, therefore, make no order in reference to the

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freight, though I would, on the application of the libellants, have referred it to the clerk to ascertain the amount of the freight, leaving the general question of the remedy open to be discussed on the coming in of the report.¹

Afterwards, on the application of the libellants to have the decree of reference enlarged, so as to embrace the freight earned by the brig on her homeward passage, an order was made referring it to the clerk to ascertain, also, the amount of freight earned or justly chargeable upon the homeward voyage, and the amount of charges and expenditures incurred in the navigation, lading and unlading of the vessel. Upon the coming in of the clerk's report, exceptions were taken because the cargo upon which freight was estimated was less than that specified in the bill of lading. The amount of the items as reported by the clerk, and the evidence upon which they rested, (being a copy of the claimants'

¹The main provisions of the decree were as follows: "That it be referred to the clerk to compute and ascertain, upon the proofs in Court, and such further evidence as either party may produce before him, the amount of such expenditures made at the port of Matamoros, in raising, repairing and refitting the said vessel after her abandonment by her former master, Titterton, and the fair reasonable value of the labor, repairs and refitments bestowed upon the vessel, at the time the same were made and supplied, and that the clerk distinguish in his report, in so far as may be practicable on the proofs, the new materials and equipments, if any were furnished, from those belonging to the vessel, at the time she stranded, and the value thereof respectively; and that the clerk also compute and ascertain, upon competent proofs, the fair value of the said brig Henry, on her arrival at this port, and before repairs were put upon her by the claimants in October last past, and also the fair value of the said vessel after the repairs and refitments put upon her by the claimants, and at the time of her attachment in this suit, and also the value of any the tackle, apparel and furniture or materials of the vessel, disposed of or retained by the claimants in making the repairs aforesaid, if any such were disposed of or retained, and that the clerk report upon the premises with all convenient speed."

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account with the master, upon the settlement of the voyage from Matamoros to New-York,) were also objected to.

BETTS, J.—A bill of lading is never considered conclusive as to the quantity of the cargo shipped, and is, at most, but *prima facie* evidence to charge the master or owner. (2 *Phill. on Ins.* 490.) The consignee or owner here would be bound to pay freight only for the goods delivered; and, as the accounting ordered demands no more than the freight earned, the amount chargeable on delivery of the goods is all for which the claimants are bound to account. The original account upon which the settlement of the voyage was made with the master has not been produced; and there is a technical objection to the evidence by which the charges are supported. But, inasmuch as the objection, if allowed to prevail, would go to exclude all the proofs offered by both parties, and, as the merits of the case are fully brought out, I prefer, rather than expose the parties to the expense of a new reference merely to verify a document necessary to both, to proceed to consider the case as if the copy were properly received in place of the original account.

As to the \$80 received by St. John at Matamoros, for the price of the vessel on her sale, it is not directly proved that it was paid over by him to the libellants. If he retains the money, he has it as a stakeholder for the libellants. But, as he was examined by the libellants in Court in relation to the proceedings at Matamoros, and this charge stood on the account against them, and there was proof of the payment of the money to him as their agent or supercargo, I think it

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belonged to them, and not to the claimants, to examine him upon the subject. The presumption is strong, that in accounting to them for the voyage, he also accounted with them for that money, as all he had to show for the vessel. I shall, therefore, allow that amount.

Various items in the clerk's report were re-adjusted, and the final decree, as entered, allowed to the libellants, for the value of the vessel at the time of her arrival in New-York, \$2,000 00
 And for the freight earned, 429 76

 \$2,429 76

Allowing first to the claimants
 the charges of the navigation
 of the vessel to New-
 York, \$227 00
 Expenses of repairs, &c., at
 Matamoros, 733 50
 Purchase money paid at Mata-
 moros, 80 00 1,040 50

 \$1,389 26

It was thereupon decreed, that the libellants recover \$1,389 26 and costs, and that the residue of the proceeds, if any, be paid to the claimants, in part payment of \$1,500 allowed to them as the fair and reasonable value of the repairs and betterments put upon the vessel before her arrest by the libellants.¹

¹ This case was taken to the Circuit Court by appeal, and additional proofs were given in that Court. The decree of this Court was reversed, upon the

JOHN PETERSON *vs.* GEORGE WATSON.

In an action for a personal tort, where the right of action is in dispute, the respondent may compromise with the libellant before decree, without regarding the libellant's costs, and such compromise will be a bar to a further prosecution of the suit by the libellant's proctor, to obtain the costs.

In actions for personal torts, Courts of Admiralty afford to seamen no remedies and no privileges to which they would not be entitled in Courts of common law.

A notice by the proctor for the libellant, to the respondent personally, in an action for a personal tort, that, in case of a compromise out of Court, he will be held liable for the costs, does not vary the relative rights of the parties, and need not be regarded.

Seemle, That the proper notice in such case would be, that the respondent pay to the proctor for the libellant the amount of the compromise money.

Where a suit is compromised without satisfying a proctor's costs, and he desires to prosecute it to recover his costs, the regular practice is to notice the cause for trial, and give notice to the opposite party that the suit is continued to recover costs and nothing more.

December 3d, 1835.

THIS was an action *in personam*, by a seaman against the master of a vessel, for an assault and battery at sea. The respondent appeared, and, by his answer, denied the allegations of the libel imputing to him tortious conduct, and justified his acts as a legal exercise of authority. Proofs were taken on both sides. Subsequently, at the instance of the libellant, the respondent compromised the cause by paying the libellant \$20, and took his release and discharge from all causes of action accruing on the voyage. The proctor for the libellant, apprehending that a clandestine settlement of the cause might be made between the parties, gave the respond-

ground that the claimants proved, by new evidence, a regular survey of the vessel before her sale, and her desperate condition when the master ordered her sale.

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ent notice, that if he settled the cause without satisfying the costs, he would be held answerable for them to the proctor. The release being set up by the respondent in an answer, by way of plea *puis darrein continuance*, the proctor for the libellant replied specially, that the release was obtained by covin and collusion, to defraud him and the officers of Court of their costs, and noticed the cause for hearing upon that issue. The libellant now moved for a decree that the respondent pay the taxed costs of the libellant, notwithstanding the settlement of the cause. The respondent opposed the motion, upon the ground that he had a right to purchase his peace, in an action for tort, before the recovery of damages, without regarding the libellant's claim for costs, and distinguished this case from cases where the right of action of the plaintiff is admitted, or costs or damages are adjudged after trial.

Erastus C. Benedict, for the libellant, cited *Toms v. Powell*, (6 *Esp.* 40;) *S. C.* (7 *East*, 536;) *S. C.* (3 *Smith*, 554;) *Cole v. Bennett*, (6 *Price*, 15;) *Read v. Dupper*, (6 *T. R.* 361;) *Randle v. Fuller*, (*Id.* 456;) *Welsh v. Hole*, (*Doug.* 238.)

Theodore Sedgwick, for the respondent.

BERRS, J.—The application now made by the libellant's proctor is not strictly regular, because he noticed the cause for hearing upon the issue of a covinous and fraudulent settlement of the action, without apprising the respondent specifically, as required by the course of practice in this Court, that he was proceeding for costs and nothing more; but, as that objection is not

insisted on by the respondent, I shall consider the general question, whether a party can settle with his adversary under circumstances like the present, without being responsible for the costs which have already accrued. This Court has had occasion heretofore to examine this subject in other aspects, and has held a respondent liable for costs, after the settlement of a suit for wages, out of Court, with the sailor personally, and in the absence of his counsel, where, under the circumstances of the case, the Court would not have advised or approved such settlement, if the costs were to be thrown on the sailor. (*The Victory*, ante, p. 443.) So, also, where the respondent and his attorney settled a claim for wages without the presence or knowledge of the libellant's proctor, by paying a sum less than the proofs taken in the cause showed to be then due, a decree was rendered against the respondent for the taxable costs. (*The Sarah Jane*, ante, p. 401.) This case is distinguishable from those, in being a suit for a personal tort, and differs from the cases of tort in the books where the attorney's costs were secured to him notwithstanding the release of his client, in being yet only in suit, no damages or costs having been adjudged against the respondent. This Court affords a party no peculiar remedy in actions of this character, nor is a seaman under any peculiar protection, nor does he enjoy any special privilege, in suits for torts. Therefore, no equity arises in behalf of the libellant here, which he could not claim if his suit had been prosecuted in a Court of common law. The question, then, rests upon precisely the same principles as if it were to be decided in a Court of common law, and as if the suit had been there settled between the

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parties, whilst in a course of prosecution, leaving the attorney to look to his client alone for the costs incurred. No case was cited on the argument, nor has any been seen by the Court, which allows the mere institution of a suit for damages in tort to carry with it a lien upon or equitable claim to the costs created in bringing or pursuing the action, or which recognises the right of the attorney, in such case, to hold the defendant responsible for his costs in the suit, before the rendition of judgment therefor. The English Courts have allowed the cause to proceed for the mere recovery of the costs, in suits for debts; but there is a diversity between the practice of the Common Pleas and that of the King's Bench, in this respect. The King's Bench recognises the lien of the attorney as extending to his client's funds in the hands of the defendant, (*Mitchell v. Oldfield*, 4 T. R. 123; *Toms v. Powell*, 6 Esp. 40,) from the time the suit is brought or notice of it is received by the defendant; but the Common Pleas regards the lien as only attaching to the interests of the client in the hands of his attorney, and that subject to the equitable claims of the opposite party. (*Hall v. Ody*, 2 Bos. & Pull. 28; *Schoole v. Noble*, 1 H. Bl. 23; *Swain v. Senate*, 5 Bos. & Pull. 99.) The Court of Chancery upholds compromises between parties, when anything is paid, though the solicitor's costs are not provided for. (See *Oldham v. Hand*, 2 Ves. Sen. 259.) If, then, this case is to be adjudged in conformity to the principles adopted by Courts of common law or by the Court of Chancery, it would seem to follow that the libellant had the absolute control of the cause, and that his settlement, upon a valuable consideration, would be an acquittance of the respondent from all

further responsibilities. The Court assumes no authority over the consciences of the litigants, to enforce an adequate compensation on such mutual adjustments, nor will it interfere to trammel the right of both to enter into them. The power to arrest or rescind the effect of a compromise is cautiously exercised in respect to suits for debts actually owing; and the caution would be more fitly applied to prosecutions for mere torts, where it would be impracticable for the Court, upon the opposing representations of the parties, and without hearing the proofs, to ascertain whether there was a just cause of action, or whether there was ground to distrust the justness of the settlement. The whole case would have to be tried, before the Court could pronounce that the suit was properly instituted, and that it afforded *prima facie* ground for the award of costs to the libellant. That manifestly could never be done, without serious inconvenience and expense; and the better practical rule will doubtless be, to leave the proctor to look to the responsibility of his client alone. Ordinarily, he will take the precaution to secure himself against the mischances of suits of this character; and, if he does not, no urgent equity is thereby created for an extraordinary interference on his behalf by the Court. Parties have, no doubt, a free right of election between tribunals of concurrent jurisdiction. Yet, it ought not to escape attention that suits are conducted in this Court with greater expense than in many of the inferior local tribunals, and, where the remedies are the same, practitioners ought not to have a bounty to encourage their selection of that Court which must be most onerous to the opposite party. In other actions *in personam* than those by

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seamen for wages, which merit the most favoring indulgences, I shall be unwilling to give proctors privileges here, in respect to costs, which they could not enjoy in any other Court. In cases of collusion and fraud, the Court might be induced to avail itself of the control afforded it by the stipulations of suitors, to shield its officers from inequitable and covert practices, set on foot and consummated to their wrong by the parties litigant. But the mere adjustment, by mutual agreement between the parties, of an action of tort, ought not, of itself, to be regarded as a fraud on the promonent, although a mariner, or as calling upon the Court to administer for his proctor a relief which might not, on the same facts, be claimed by the proctor of any other suitor.

The notice given to the respondent does not, in my opinion, vary the relation of the parties. I will not say what the effect of such notice might have been, if it had gone no further than to require the amount of compromise money to be paid to the proctor, and not to the libellant personally; or whether, under such premonition, the respondent might have been compelled to pay to the proctor a sum not larger than the amount of the taxable costs. But, in this case, the notice forbade any settlement of the cause, without satisfying the proctor's costs. It accordingly assumed a direction in the matter beyond the right of the proctor, and one which the respondent was not bound to observe. The respondent was not bound to regard the costs of the libellant's proctor in the light of a lien on him or on any funds under his control; because no costs could exist until damages had been decreed against the respondent, and because even a recovery

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in such a suit does not necessarily carry costs as an incident, in Admiralty. A mere proffer to buy peace, in vindictive actions, is never deemed an admission of a right to any recovery in them; nor should the fact of the payment of \$20 by the respondent, to free himself from the detention and expenses of a contested suit in this Court, be regarded as an acknowledgment by him that he was in fault, and that a decree must, in the end, have passed against him. There is, then, no equity shown by the libellant's proctor in demanding the payment into his hands, in the first instance, of even the sum received by his client, or any part of it; and, unless that equity manifestly appears, there would, in my opinion, be no justifiable cause for continuing the suit and charging costs on the respondent. I shall, therefore, decree the settlement to be a full bar to the further prosecution of the suit.

Decree accordingly.

WILLIAM THOMAS vs. CADWALLADER GRAY.

Where a supplemental libel is filed before the process is returnable, it becomes part of the pleadings, without further notice to the respondent, and he is bound to answer it.

When the respondent has been arrested in a suit *in personam*, the answer is not filed, within the meaning of the 18th rule, until bail is perfected.

Where a replication is not filed within the time required by the rules of Court, the respondent will be held to have waived the benefit of the rules in that respect, unless he takes advantage of the point when evidence is offered at the hearing.

Courts of Admiralty do not encourage suits *in personam*, for personal torts committed upon tide-waters within the ports and harbors of a State.

Aliter, when a tort committed upon tide-waters gives a right of action *in rem*,

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or when a tort is not the sole cause of action, but is connected with other matters which are within Admiralty cognizance.

Where a seaman, before his period of service is ended, is imprisoned by the local authorities in a home port, on a well-founded charge of mutinous conduct, the master is not liable for the seaman's wages which accrue during the time of his imprisonment.

Such imprisonment may, however, be deemed an adequate punishment for the offence, and prevent a subtraction of the wages earned prior to the imprisonment.

If several distinct causes of action are united in the same libel, the costs may be distributed, and each party may recover costs on those branches of the action in which he succeeds.

In a libel to recover wages and also damages for an assault, where the claim to wages was sustained, but the claim to damages for the assault was dismissed, the libellant recovered wages and costs, and the respondent also recovered costs, the two recoveries being set-off against each other, and execution being awarded to the party in whose favor the balance was found.

February 12th, 1836.

THIS was a libel *in personam*, by a seaman against a master for the recovery of wages, and of damages for an aggravated assault and wounding by shooting with a pistol. The libel was filed on the 5th of June, and the process sued out was returnable on the 7th of July. On the 25th of June, a supplemental libel, by way of amendment, was filed. The original libel set out a contract of hiring by the month, and claimed \$32 and upwards as due for wages. The amended libel alleged, that the libellant had shipped for six months, and claimed wages for the whole period, on the ground that performance of the entire contract on the part of the libellant had been prevented by the misconduct of the respondent. The answer was filed on the 7th of July, and bail was put in on the 9th. On the 17th, a replication, in the usual form, was filed by the libellant. The evidence offered by both parties at the hearing, upon the issues raised by the pleadings, was full, and, in many respects, contradictory.

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It appeared that, when the vessel was in New-York, the libellant had absented himself for a day or two previous to the 9th of April, and that, on the morning of that day, after the crew had breakfasted, he returned and placed himself in the way of the crew who were at work, and refused to work himself, unless breakfast was prepared for him. The respondent thereupon endeavored to put him out of the way, and was violently assaulted by the libellant. The respondent then went on shore and procured a police officer. On his return, the libellant, having armed himself with an iron marling-spike, fastened it to his arm with a lanyard, and went up the fore-rigging, threatening to take the life of any one who approached him. A number of persons having collected, the libellant finally came down, and was taken to the police office, and afterwards to the hospital, in consequence of a wound received in the knee while he was in the rigging. A pistol was fired at the libellant, by the master, before he came down, but the weight of evidence proved that the wound was the consequence of the libellant's own act in aiming a blow at the respondent with the marling-spike, which was suddenly brought up against the knee of the libellant by the jerk of the lanyard. The answer set up a forfeiture of the wages due to the libellant for his services prior to his imprisonment.

A deposition of Tobias Guttridge was offered as evidence on the part of the libellant, and was objected to, on the ground that the witness was a resident of the city of New-York, and was not proved to be absent at the time of trial.

After the evidence was put in, the case stood over, for argument, to a subsequent term.

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Alanson Nash, for the libellant.—I. The tort was committed on a vessel where the tide ebbed and flowed, and within the Admiralty jurisdiction. (*Peyroux v. Howard*, 7 Pet. 324, 343; *The United States v. Bevans*, 3 Wheat. 336.) The jurisdiction is, in this respect, the same in a civil suit for a tort as in a suit on a contract. (*M'Grath v. The Candaleiro*, Bee's R. 64.) II. Parties may file, by way of amendment, new allegations, not charging new and distinct causes of suit. Proceedings in Admiralty are, in conformity with the ancient practice, supposed to be in open Court, and the parties to be always present; and the amended libel was filed some days before the process was returnable or the answer was filed. III. The answer cannot be considered as having been filed until the bail was perfected. The 20th rule allows the libellant ten days to except to the answer, and the rule of October, 1833,¹ should be so construed as not to impair the right given by the 20th rule. Accordingly, fourteen days must elapse after bail is perfected, before the libellant, by not filing a replication, can be held to have admitted the matters set up by the answer. Moreover, the objection that the replication is no part of the pleadings, if it ever existed, has been waived by the respondent; because, at the hearing, evidence was offered and depositions were read by both parties, for and against the allega-

¹ This rule was as follows: "The matter set up by a sworn answer, responsive to the allegations or interrogatories of the libel, shall be deemed admitted on the part of the libellant, unless, within four days from the time the answer is filed, a replication is filed, or a written notice served on the proctor of the respondent, that on the trial of the cause proof will be offered on the part of the libellant, in opposition to the allegations of the answer." (See *The Mary Jane*, ante, p. 390.)

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tions of the answer. IV. The respondent is liable for wages for the full term of six months, since, by his own act, he prevented the libellant from fulfilling the contract on his part. (*Hoyt v. Wildfire*, 3 Johns. 510; *Emerson v. Howland*, 1 Mas. 45.)

Washington Q. Morton, for the respondent.—I. The offence, if any, was committed at a wharf, within the jurisdiction of the civil authorities, and whilst process from them was actually out to arrest the libellant. The case is, therefore, not within the Admiralty jurisdiction, and the libel ought to be dismissed. II. The case stands before the Court upon the libel and answer alone. The amended libel is no part of the pleadings, the respondent having had no notice or knowledge of its having been filed. III. The replication is no part of the pleadings, because the libellant did not file it within four days after the respondent's appearance was entered and his answer was put in, but suffered ten days to elapse. Therefore, under the rule of October, 1833, he should be held to have admitted the matters set up by the answer, and the testimony offered to contradict the allegations of the answer should be excluded. IV. A master of a vessel may enforce obedience to his orders in port as well as at sea. The means used by the respondent were lawful and proper; and the same degree of misconduct which renders a seaman unfit to be taken to sea, justifies a master in putting him on shore, and forfeits all wages then due. (3 *Kent's Comm.* 181; *Relf v. The Ship Maria*, 1 *Pet. Adm. Dec.* 191.)

BETTS, J.—Two objections of a preliminary charac-

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ter are taken on the part of the respondent—one as to the effect of the supplemental libel and the admissibility of proofs under the issue, as it is formed, and the other to the jurisdiction of the Court with respect to the assault and wounding.

The original libel was filed on the 5th of June. On the 25th, an amendment was filed, introducing the allegations, that the libellant was compelled, by the cruel treatment of the master, to leave the vessel, and is, therefore, entitled to wages for the full period of six months. The original libel claimed that \$32 and upwards were due for wages, over and above all just allowances. The answer was filed after the filing of the supplemental libel; and it is alleged by the respondent, that the answer was put in without notice that a supplemental libel had been filed. Proceedings in Admiralty are deemed to be *apud acta*, in open Court, and by authority of the Court. (*Clerke's Praxis*, tit. 19; *Clerke's Eccl. Pr.* tit. 31.) The intendment of law is, that both parties thus have notice, *in facie curiæ*, of all processes in the cause, by the act of taking a step in it. When the warrant of arrest was returned and called in Court, the supplemental libel was duly on file, and a component part of the original. The answer then interposed must, accordingly, be taken as made to the entire libel. If the supplemental libel had been filed out of Court, after the return of the process, and without notice to the respondent, it would be wholly nugatory, and could not now be used as part of the pleadings, unless the answer explicitly recognised and adopted it by replying to its averments. It will be of no practical importance to pursue the inquiry, in this instance, whether this amendment be-

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came part of the pleadings by being regularly in Court, or by the recognition of the respondent. An issue upon the allegation that a specific sum and more was due, would justify the full latitude of proof admissible under the more direct and explicit averment, that six months' wages were due.

It is further insisted, that by the practice and the standing rules of the Court, the libellant is precluded from offering proofs against the allegations of the answer, because his replication was not put in until ten days after the answer was filed. By a rule adopted in October, 1833, a libellant is held to admit the matters set up in the answer, if he does not, within four days after the answer is put in, file a replication thereto. (See *The Mary Jane*, ante, p. 390.) Under a sound construction of the 18th rule,¹ the answer cannot be regarded as put in or filed, until bail is perfected, that act being necessary to give a respondent a complete *locus standi* in the cause. The respondent further insists, that the ten days allowed to a libellant, by the 20th rule, to except to an answer, should be added to the four days, so that fourteen days must elapse after bail is perfected, before the statements of an answer can have effect as being admitted on the part of a libellant.² It appears to me, however, to be unnecessary to settle this point of practice in this case, for,

¹ This rule was as follows: "No claim or answer shall be filed unless it shall be sworn to; and, in case of bailable process *in personam*, unless the party arrested appear, or put in bail according to the rules of the Court, his claim or answer shall not be received by the Court, but shall be treated as a nullity, and his defaults entered."

² By the 88th rule, the libellant now has "four days from the time the answer is perfected, or from the expiration of the time allowed for excepting thereto," within which to file his replication.

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admitting that the respondent had a right to claim the advantage given him by the rule of October, 1833, he has, by his own acts, unequivocally waived its application. On the hearing, the libellant read depositions previously taken in the cause, and gave oral proofs at large against the statements in the answer, without any objection on the part of the respondent that he was precluded, by the rule referred to, from controverting those statements. So, also, the respondent himself read a deposition filed by him on the 1st of September, and called and examined a number of witnesses to maintain his defence. The objection, that the replication was filed out of time and that the answer must be regarded as full proof, is first advanced at this term, to which time the cause stood over for argument. This is too late. Objections to the admissibility of evidence must be made when the proof is offered, or the party can never avail himself of them. (1 *Stark. Ev. pt. 2*, p. 121.) If the libellant has committed any irregularity in his proceedings, the objection must be brought forward in such manner as not to debar him of an opportunity of applying to the Court for relief, by way of amendment or otherwise. It would be against every principle of sound practice, to allow the respondent, after he has permitted his adversary to continue proceedings and accumulate expenses in the suit, and upon an after thought, or upon a defect of form known to himself but concealed from his antagonist, to cause the testimony of the libellant to be rejected, and thus secure a decision of the cause upon his answer as the sole testimony. The testimony is, therefore, properly before the Court; and it is not intended to intimate that the libellant, on the facts disclosed, would have

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been debarred from offering his proofs, if the objection to them had been made at the earliest opportunity after the replication was filed.

This Court has heretofore, when it was practicable, avoided taking cognizance of causes of action arising within the harbors and territorial jurisdiction of the State, not strictly of a maritime character, and where the remedy would be merely coincident with that supplied at common law; although there is high authority sanctioning the jurisdiction in such cases. (2 *Browne's Civ. and Adm. Law*, 169; 3 *Black. Comm.* 106; 2 *Sir Leo. Jenkins*, 774; *Chamberlain v. Chandler*, 3 *Mason*, 242; *Thorne v. White*, 1 *Pet. Adm. Dec.* 172, 174.) Suits *in personam*, founded on torts as the sole cause of action, have, therefore, not been adjudged sustainable in this Court, unless the injury was received upon the high seas. (See *Borden v. Hiern*, *ante*, p. 293.) But the present case is not so circumstanced, upon the facts and pleadings, as to demand an explicit judgment on that point: Proceedings *in rem* are sustained, when the cause of action is maritime in its nature, without regard to the locality of its origin, whether upon the high seas, or in bays or harbors where the tide ebbs and flows, or even on land, upon the acceptation that those cases are not embraced within the reservation, in the 9th section of the act of Congress of September 24th, 1789, (1 *U. S. Stat. at Large*, 77,) of cases in which the common law affords an adequate remedy. But it may be essential to the jurisdiction of the Court, particularly in suits for services, that the locality of the service and the nature of it should both be maritime. When the privilege of a lien on a vessel or on goods is accorded, this Court, therefore, considers itself bound

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to afford suitors the aid of its remedies, without regard to considerations of local jurisdiction.

A suit in Admiralty, simply for an assault and battery, would take from a jury and leave to the discretion of a single judge, the determination of an allowance of damages, and would, in that respect, be a departure from a cardinal usage and principle of American jurisprudence; but I am by no means prepared to declare such a suit not to be within the lawful jurisdiction of this Court. When a claim for damages for personal wrongs is connected, as an incident, with other matters properly appertaining to the cognizance of Admiralty, it is the habit of the Court to take jurisdiction of both causes of action; because the personal tort may well be inquired into, and damages, by way of compensation, be awarded, upon the same testimony, and thus the duplication of suits be avoided, and because the division of actions into stated formulas does not prevail in Admiralty, and the rights of both the actor and the respondent are adjusted upon the whole case made, without regard to the denomination of the causes of action in pleadings at common law. But, if the tort be sued singly, as a substantive cause of action, the Court, if not at liberty to reject the jurisdiction entirely, is careful to discourage appeals to its exercise, by every legitimate power. This claim for damages, in the present case, being coupled with a demand for wages, may properly be disposed of in this action, since all the proofs on both sides have been given without any exception having been taken, prior to the final hearing, to the jurisdiction of the Court.

The objection to using Guttridge's deposition, because he is a permanent resident of the city, and has

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not been proved to be now absent, must prevail. On the examination of the deposition, however, it is not found to contain matter that would change the character of the cause in the libellant's favor, even if the Court might disregard the objection to it or should open the cause for the purpose of receiving the *viva voce* examination of the witness.

(The opinion, after examining minutely the testimony of the various witnesses in the cause, proceeded :) Admitting that the libellant's proofs import that the libellant was wounded by the firing of the pistol into the rigging by the master, the witnesses stand so far contradicted and impeached by the general bearing of the whole evidence, that no safe reliance can be placed on their testimony, nor can any decree be properly rendered thereupon against the respondent. Even the fact of the wounding by a pistol shot is not affirmatively asserted by any witness. It is inferred, from the appearance of the injury when the libellant was under surgical treatment in the hospital, as proved by Doctor Stevens, and from the circumstances, that after the firing the libellant descended from the rigging bleeding in one of his knees and lame, and that, to an inquiry of some bystander, if he had been shot, he replied, in the presence of the respondent, that he had. Against this implication and presumption, there is the answer of the respondent, which may at least be received as evidence explanatory of the transaction, if not as substantive proof for the defence, and which positively denies the wounding; and there is also, more particularly, the testimony of several disinterested and unimpeached witnesses, who saw the libellant hit by the marling-spike when, in his attempt to strike the

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master with it, it was jerked back by the lanyard. Upon a careful consideration of the proofs in the case, I am of opinion that the libellant has not substantiated any cause of action against the respondent for a personal tort.

The conduct of the libellant towards the respondent on board the vessel, on the morning referred to in the pleadings and proofs, is fully proved to have been insubordinate to an extreme degree. Not only was his language insolent, and his behavior generally disorderly and disobedient, but he seized the master in a manner and with a state of temper which indicated a mutinous purpose, and might authorize his arrest for that offence. His conduct was so violent and refractory that the master was well justified in calling in the civil authority to control and punish him. The libellant was taken out of the vessel by process of law, and whether that was afterwards prosecuted or not will not vary the rights of the respondent, since he establishes an adequate cause for resorting, in the first instance, to the aid of the authorities. After the libellant obtained his release from that arrest, he was put into the hospital, being disabled by his wound from doing duty on ship-board, and never again joined the vessel or offered to do so. Therefore, he cannot charge that detention against the respondent, it being already shown that the respondent is not answerable for the wound itself. And, as the commitment of the libellant, in a home port, to the custody of the civil authority, to answer for a breach of the peace and for acts of personal violence to the master, was justifiable, there is no ground for the claim to wages during the period of that confinement or de-

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tention by law, although it was during the running of the contract of hire, no improper act of the master having prevented the libellant from performing his duties and fulfilling his agreement. The claim for wages for the time subsequent to the arrest of the libellant is accordingly dismissed. But I think the libellant is entitled to recover his wages to that period. Admitting that the maritime law applies to vessels moored at a wharf in a home port, and that seamen so situated are subject to all its penalties, I do not regard this as a case for the forfeiture of wages, under the principles of that law; and it is not attempted to bring the case within the provisions of the 5th section of the act of July 20th, 1790, (1 *U. S. Stat. at Large*, 133.) It seems to be a very rational restriction of the maritime rule of forfeiture of wages, that it shall not, unless made so by positive law, be in all cases one of total confiscation, and, particularly, that it need not be used to supply the master with a double mode of punishment. When he exercises his authority, and subjects a seaman to confinement or to corporal punishment, or delivers him over to the municipal law, for acts of disobedience or misconduct, he should not be enabled to superadd a forfeiture of wages for the same offence. (*Thorne v. White*, 1 *Pet. Adm. Dec.* 176, 177.) The spirit of this benign principle has been practically applied in cases of mutinous conduct, for which a conviction on indictment had actually been had. (*The Ship Mentor*, 4 *Mason*, 90, 93.) The conduct of the libellant in this case was disorderly and inexcusable; but I think the course adopted by the master, of delivering him up to be dealt with by the civil authority here, and his actual confinement in prison for a fortnight

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on the charge, an adequate punishment, and I do not feel required to adjudge the forfeiture of the balance of his wages as an additional punishment. It may probably rest in the discretion of the Court, either to mulct the libellant for the act, or to subtract his entire wages, or to discharge him from all other punishment than what he has already received therefor. The latter alternative, I think, meets the justice of the case. Accordingly, I shall decree that he recover \$5 50, the sum unpaid, for his month's services. Costs will also be allowed to him, because his wages were never offered to him, and his right to recover them has been contested here. But, inasmuch as he has connected with his action for wages one for a personal tort, and that has induced the chief litigation and expense in the cause, and as the latter action was wholly groundless, it is just that he should bear the expenses thus created by himself. It is a common course of proceeding at common law, to apportion costs in this manner, and impose on a suitor successful in part, the charges induced by him in coupling other unsuccessful matters with his action or defence; (*Graham's Pr.* 584, 585; *Waddington v. The United Ins. Co.* 17 *Johns.* 23;) and it is the practice of the Court of Chancery to do so. (*Vancouver v. Bliss*, 11 *Ves.* 468.) This Court, in the like exercise of an eminent equity jurisdiction, feels constrained to observe those persuasive principles of common justice, upon which the practice in respect to costs is founded. (*The Apollo*, 1 *Hagg.* 319.)

A decree must be entered, that the libellant recover \$5 50 for his wages, and his costs, and that he pay to the respondent his costs to be taxed, and that the libellant's wages and costs be set off against the respondent's costs,

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and that the party to whom the balance, if any, is due, have process against the other party for the recovery of such balance.

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JOHN GOULD, BY EDWARD S. GOULD, HIS NEXT FRIEND,

vs.

CHRISTIAN H. CHRISTIANSON.

A minor, who is placed by his father in a ship for an experimental voyage, to improve his health, and to learn navigation and the duties of a seaman, and who signs the shipping articles as a boy, is subject to the rules and discipline of the ship.

The master, in the exercise of a reasonable discretion, may rightfully inflict corporal punishment on such minor.

No distinction, in this respect, exists in law, between common sailors and young men of education and refinement and of gentle bringing up.

It is a matter of public policy to encourage youths of cultivated minds and respectability of character and position to enter the merchant marine as seamen.

Discipline on shipboard should, in all cases, be carried out, if it is practicable, by suasion and reasoning addressed to the men; and masters can employ force only when it is manifestly necessary.

This principle is most strictly obligatory in respect to boys who are known to the master to labor under physical infirmity, or to have been delicately brought up, or to possess talents and acquirements and to have entered the service to qualify themselves for the profession.

The master is not in *loco parentis*, in respect to a minor, so as to be exempt from responsibility in an action by such minor for a wrongful exercise of power in correcting him, to the same extent that a father might be exempt.

In such action, damages will be estimated with regard to the character and position of the libellant, and will not be limited exclusively to a remuneration for the bodily injury.

Excessive or vindictive damages will not be awarded in such a case, unless the punishment has been wantonly inflicted by the master, with a view to the disgrace and mortification of the libellant, and not for the enforcement of discipline.

February, 1836.

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THIS was a libel *in personam*, to recover damages for assault and battery. The facts which governed the decision of the case will sufficiently appear in the pleadings,¹ and in the opinion of the Court.

¹ The pleadings in this case are inserted at large, that the references made to them in the opinion of the Court may be the better understood, and that the version of the case given by each party under oath may fully appear. The libel, which was filed on the 20th of November, 1834, was as follows:

To the Honorable Samuel R. Betts, Judge of the United States for the Southern District of New-York:

The libel of John Gould, an infant, under the age of twenty-one years, exhibited by Edward S. Gould, his nearest friend, sheweth,

That your libellant, with a view of learning the art of navigation and the management of ships at sea, engaged himself on board the ship *Commerce*, of Philadelphia, of which Charles H. Christianson was master, in the month of May, in the year of our Lord one thousand eight hundred and thirty-three, to perform a voyage from the United States to the Pacific Ocean, and the ports of Chili and Peru therein, and thence to Canton, and back to New-York; and your libellant entered on board the said ship as a sailor or boy before the mast, and, at all times during the said voyage, while on board the said ship, performed his duty according to the best of his knowledge, skill and bodily strength.

Your libellant further sheweth, that he was then of the age of eighteen years, of slender make and strength, and had never before been to sea, and had been wholly unaccustomed to the duties and hardships of a sailor's life, and, having friends and relatives in easy and affluent circumstances, pains were taken to explain the situation of this libellant to the said Charles H. Christianson, who was wholly apprised of your libellant's situation, before the sailing of the said ship.

Your libellant further sheweth, that at various times prior to this libellant's leaving the said ship at Valparaiso, in South America, hereinafter mentioned, and without any just or reasonable cause, and, as your libellant believes and alleges, with the mere wantonness of cruelty, and to show his power and dominion over what he termed a gentleman's son, the said Charles H. Christianson beat, bruised and ill-treated, by blows with his fists, with his feet, and with large and unsuitable ropes, the body of your libellant, and degraded and disgraced him as far as was in his power, and accompanied his said ill-treatment with oaths, curses and gross verbal abuse, all of which misconduct on his part was committed on the high seas, and within the jurisdiction of this honorable Court, and without the criminal jurisdiction of any other Court.

Your libellant, in specification of his aforesaid general allegation in this behalf, doth further show, allege and declare as follows, that is to say:

First.—That on or about the third day of June, of the said year, after they

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Daniel Lord, jr., for the libellant.

Joshua Coit, for the respondent.

BETTS, J.—Both parties have gone into very extended proofs in support of their respective pleadings and

had been at sea about a fortnight, this libellant passed forward along the weather side of the companion-way, doing so in ignorance of and inadvertance to the etiquette of that passage being reserved to the ship's officers and passengers; whereupon, the said Charles H. Christianson seized this libellant with great violence, and pushed him as violently as possible against the lee rail of the ship, inflicting a severe bruise upon the body of this libellant, the effects of which continued for several days, at the same time using, in presence of the supercargo, a passenger, and several of the crew, language to the following effect: "You damned booby, I'll teach you to come this side."

Second.—That, on the fourth day of June aforesaid, your libellant being put to picking potatoes on the quarter-deck, and leaning against the binnacle-house, the said Charles H. Christianson came up, and, without any order or remonstrance to this libellant, and without any knowledge or suspicion on your libellant's part that he was in any fault, kicked your libellant under his right arm with violence, in the presence of the other boy on board, at the same time using language to the substance and effect following, namely: "You damned lazy rascal, lie down to your work."

Third.—That, on or about the second day of said June, when the ship was in the operation of tacking, at about five o'clock in the afternoon, this libellant, not knowing which rope was the main sheet, and being guilty of no fault in this respect, the said Christianson violently collared your libellant with one hand, and struck him violently with his other fist in the back, and shoved your libellant towards the rope, using the language: "There, damned rascal, see it now."

Fourth.—That, on or about the twentieth day of June aforesaid, this libellant, being ordered to find the mizzen-royal brace, and being unable, from his inexperience, to do so, the said Christianson showed it to this libellant, and asked him if he would know it, whereupon this libellant answering, "Yes, sir," the said Christianson struck this libellant with the said rope, with his full strength, adding: "Shall you remember it now, you damned rascal!"

Fifth.—That, on the same day last mentioned, this libellant being forward, and lifting the fore-topmast studding-sail, and declaring his inability to lift it, the said Christianson used to your libellant the language: "Yes, you can, you damned rascal, you don't lift a pound;" and, as your libellant was stooping to try to lift it again, the said Christianson knocked your libellant down upon the deck by a stroke with the end of the main-tack, a very hard rope,

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to repel the allegations brought against them. One commission was executed at Valparaiso and one at

about two inches in diameter, upon the small of the back, and stood over your libellant, ready to renew the blow; that he then laid down the rope, and turned away; that the effect of this blow was a chronic inflammation of the membrane enclosing the spine, and an injury from which your libellant has not yet recovered.

Sixth.—That, on or about the twenty-fourth day of June, being on the quarter-deck, in presence of several passengers, the said Christianson asked your libellant where a rope led which he had hold of; that your libellant, being near-sighted, could not immediately tell, upon which said Christianson knocked off this libellant's hat, caught him by the hair, pulled his head back, and rubbed his ears violently and said: "Now, you damned blind man, do you see?" and your libellant declares that he was inexperienced, and did not know all the ropes in the ship, and the said Christianson was well aware of the fact.

Seventh.—That, on or about the twenty-fourth day of July, the wind blowing a gale, and the ship rolling heavily, your libellant was walking aft, holding on to steady him, whereupon the said Christianson struck your libellant and kicked him down to leeward, and, as your libellant stopped half way, he followed him, and kicked him the remainder of the distance across the deck, adding: "You damned wooden man, take that."

Eighth.—That, on the twenty-sixth day of July, your libellant having a leather belt around him, fastening his coat around him, the said Christianson, without other cause or provocation than merely this deponent's having on said belt, (never having been forbidden to wear it,) took off the said belt, flogged your libellant with it, and threw it overboard, and in the evening pulled your libellant's nose and ears, and slapped his face.

Ninth.—That, on or about the fourth day of August, your libellant was sick, and was ordered by said Christianson to feed the pigs on board. Your libellant told the man bringing the order, of his inability, upon which the said Christianson renewed the order, and threatened to flog your libellant. Your libellant then went on deck on his hands and knees, and crawled about to execute said order, being unable to do otherwise, whereupon the said Christianson kicked your libellant along, saying that he was a damned lazy skulking rascal.

Tenth.—That, on or about the nineteenth day of August, this libellant standing awkwardly at the pump in pumping the ship, the said Christianson kicked and struck this libellant until the said Christianson was tired and ceased for that reason.

And your libellant further shows that, in a vast number of other instances, for the most trifling causes and on the most insufficient provocation, the said Christianson was in the habit of striking, beating and swearing at your libellant, and treating him in all respects in the most degraded and brutal manner, in presence of crew and passengers, he, the said Christianson, knowing that,

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Canton; ten other depositions were taken out of Court, and six witnesses were examined orally on the hearing.

from the libellant's previous mode of life, such conduct was more deeply wounding to the feelings of this libellant, as a man able to feel disgrace, than the mere bodily suffering, however severe.

Your libellant humbly submits that the said Christianson, both by way of redress and reparation to your libellant, and by way of example to others and of monition to himself, ought to be compelled to make ample satisfaction to your libellant for the said grievances, and that five thousand dollars is claimed by your libellant as such satisfaction.

Your libellant further sheweth, that the said Christianson is now within this district, and your libellant apprehends that he will depart therefrom without delay.

To the end, therefore, that the said Charles H. Christianson may be compelled to answer in this honorable Court in the premises, and may be decreed to satisfy your libellant in the premises for all the said grievances, and that he may be held to bail in such sum as your honor shall think meet, may it please your honor to award the process of this honorable Court to the marshal, commanding him to take the said Charles H. Christianson, and hold his body until he shall have answered the premises, and have performed and made such satisfaction in damages to your libellant as your honor shall judge suitable and decree in this behalf.

And your libellant will ever pray.

Sworn this 20th day of November, A. D., 1834,

JOHN GOULD.

FRED. J. BETTS, *Clerk*.

DANIEL LORD, JR., *Proctor*.

On the filing of the libel, bailable process in the sum of \$500 was issued. The answer, which was filed on the 3d of December, 1834, was as follows:

To the Honorable Samuel R. Betts, District Judge of the United States for the Southern District of New-York:

The answer of Christian H. Christianson, who is proceeded against by the name of Charles H. Christianson, master of the ship Commerce, to the libel of John Gould, who sues by his next friend, Edward S. Gould:

This respondent, saving and reserving all manner of benefit of exception to the many errors, insufficiencies and untruths in the said libel contained, for answer thereto, or so much thereof as is necessary to be answered, says, that it is true that this respondent was master of the ship Commerce, of Philadelphia, for the voyage from the port of New-York to Canton, and back, in the libel mentioned, and that the libellant shipped on board the said vessel for said voyage out and home, as boy, but not as seaman. And this respondent supposes, and therefore admits, that the said libellant may have had a view of learn-

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It is not important to analyze, in this opinion, this mass of testimony. Its general bearing throughout is in

ing the art of navigation and the management of ships at sea, in engaging in the said voyage. And this respondent admits, that the libellant was, at the time aforesaid, of about the age of eighteen years, and was of a rather slender frame, though not remarkably so for that age, and that his friends were in easy and affluent circumstances, and that the libellant was unaccustomed to the duties and hardships of a sailor's life. But this respondent denies that he was ignorant of the hardships he would be compelled to undergo in this occupation. On the contrary, this respondent saith, that he was applied to by Mr. Pelatiah Perit, of the house of Goodhue & Co., of the city of New-York, the consignees of the said ship, in behalf of the said libellant, for a situation for the said libellant as ship's boy for the said voyage. That respondent was averse to taking the libellant, from his experience of the trouble and difficulty often arising from taking persons under similar circumstances, and stated such objections to the said consignee, and that the respondent did not consent to take the libellant until he had an interview with the father of the libellant, when respondent repeated to his said father his objections to taking the libellant, and stated to him distinctly the nature of the duties that would be required of him, and the hardships that must be encountered, to all which his father replied, that the libellant was aware of it, but had set his mind upon going to sea, and urged deponent to receive him accordingly, and defendant at length consented, as a favor, to receive him in that capacity.

And this respondent further saith, that he endeavored to teach the libellant the duties of practical seamanship, by himself and officers, by showing him the different ropes and parts of the vessel, and explaining their names and use, and by putting him to such work as was suitable to his strength and capacity, and, in so doing, used no undue or unreasonable hardship or severity, and not more than the necessity of the case required, nor than is customary in training boys for the rough and hardy life of a seaman. And this respondent denies that he was guilty of cruelty towards the libellant, through wantonness, or to show his dominion and power over a gentleman's son, or through any other cause, or that he at any time bruised or ill-treated him either with his fists, feet, or with large or unsuitable ropes. On the contrary thereof, this respondent saith, that the libellant was treated with kindness and indulgence; that he was not required to sleep in the fore-castle with the common sailors, but occupied the steerage with the carpenter and one John Childs, a gentleman's son, who came on board under like circumstances; and further, that a part of the time the libellant was excused from his regular duty on deck, and only assisted in the cabin; and that, at all other times, he was only required to attend to the ordinary boys' business on board ship. And respondent further saith, that the libellant was exceedingly awkward and useless about ship, and that he either took no pains or was unusually dull in learning his duty on board, and was

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contradiction of the inflamed charges of the libel, and goes to prove the conduct of the respondent, in the

accustomed to set about his work muffled up in great-coats and jackets, entirely unfit for his station and occupation, and for all which this respondent at times reprimanded the libellant, but without abuse, curses or other ill language, and respondent may at times have gently laid his hands upon libellant, and quickened his movements, or directed his attention when he was peculiarly backward or dull in executing orders, but without any more violence than was requisite for such purpose, and without any intention of injuring or ill-treating the libellant; but defendant has no recollection of other instances than such as are hereinafter set forth. And this respondent further answering denies, that he was guilty, at the several times in the libel particularly mentioned, of the assaults and outrages therein set forth, or any of them. And this defendant denies, that on or about the third day of June, in the libel mentioned, he seized the defendant, and pushed him with violence against the lee rail of the said ship, or inflicted any serious bruise on the body of the libellant, but defendant admits that, after he had informed the libellant of the usage of ships in regard to the use of the weather side, and had cautioned him against trespassing against the said usage, upon libellant's disobeying such direction, this respondent may have taken hold of the libellant and removed him to the proper side of the vessel, using no more force than was proper and necessary for that purpose. And this respondent denies, that on the fourth of said month of June this defendant kicked the said libellant. And this defendant denies, that on or about the 2d day of June aforesaid, this respondent collared and struck violently the said libellant; but this respondent says, that about that time, to the best of respondent's recollection, on the occasion of tacking ship, the libellant being ordered to take hold of the main-sheet, and being very slow or backward in obeying the orders, respondent alightly pushed the libellant towards the same to quicken his steps, but without abuse or undue violence. And this respondent further answering denies, that on or about the twentieth day of June, this respondent struck the libellant with his full strength with the mizzen-royal brace; but this respondent saith, that at or about that time, as nearly as respondent recollects, the libellant, having been repeatedly shown the said rope, and being, in the course of the duty of the ship, ordered to take hold of the same, did not obey the order; that defendant thereupon showed him the rope again, and slightly bit the libellant with the bight of it over his jacket or great-coat, for the purpose of quickening his attention and making him more observant of his duty, but the same was without violence, and could have inflicted no injury on the libellant. And respondent saith, that the said royal mizzen-brace is one of the smallest and loosest ropes on board the ship, of about half an inch diameter. And the respondent further answering denies, that on the same day last mentioned, or at any other time, this respondent struck or knocked down the libellant with the main-tack or with any other

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treatment of the libellant, to have been, ordinarily, mild and unobjectionable. This is the tenor of the

large rope; and the respondent says that the main-tack is a very large, hard rope, and deponent believes that such a blow as in the libel stated would have killed or disabled the libellant. That this respondent is very certain that he never struck a common sailor in such a manner, and that he certainly could not have so struck a lad like the libellant. And this defendant further answering denies, that on or about the twenty-fourth of said June, respondent knocked off libellant's hat, pulled his hair or rubbed his ears with violence, but respondent saith, that at or about that time, as well as respondent can recollect, libellant, through neglect and inattention, not being able to find a rope which he was ordered to do, this respondent may have slightly taken hold of libellant and turned his head in the direction of the rope, for the purpose of directing his attention thereto and making him more attentive to his duty, but without violence or the abusive treatment in the libel stated. And this defendant further answering denies, that on the 24th day of July, this respondent kicked the libellant, or that he kicked him at any time.

And this defendant further answering says, that the said libellant was ordered and instructed to dress himself in proper seaman's apparel, but that, in neglect and disobedience of such orders, he persisted in going about muffled up in great-coats, jackets and handkerchiefs, altogether unfit for his station and occupation, and that some time, on or about the twenty-sixth day of July, as well as respondent recollects as to the time, the libellant being about his work in a superfluous quantity of coats and jackets, secured round his body by a leathern belt, which incapacitated him for prompt and seamanlike attention to his business, this respondent took off and threw away the said belt, and directed the libellant to adopt a different sort of dress while about his work; and this respondent thinks that he hit the libellant over his great-coat with the said belt, which was a very light and trifling one, for the purpose of enforcing his orders aforesaid, but without inflicting any injury on his person; and this respondent denies that he pulled the libellant's nose and slapped his face; and this defendant denies, that on or about the fourth of August, this respondent kicked the libellant, or used the abusive language in the libel mentioned; that defendant did not, on that occasion, require the libellant to perform any work beyond his health and strength; that he did not then, nor does he now suppose or believe that the said libellant was unwell or unable to attend to the lighter duties about the ship; and defendant saith, that he was required to feed the pigs as a necessary piece of work usually attended to by the boys on board, and not as an ignominious or disgraceful thing for the libellant to do; and defendant denies, that on or about the nineteenth of August, this respondent kicked or struck the libellant till respondent was tired, or that then, or at any other time, to the best recollection of respondent, he kicked or struck the libellant at or near the pump; and this respondent denies that he made use of

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evidence given by the libellant's own witnesses, who were in the ship with him—not merely the crew, but

the profane and abusive language in the libel stated. On the contrary, this respondent saith, that the use of such language was contrary to the public standing orders of the ship, and contrary to the habits and usage of respondent. And respondent submits, that, in the instances of slight correction aforesaid, this respondent, as such master, was justified and required so to correct the libellant, as well for his own improvement as to insure the prompt and seaman-like attention to the duties and necessary etiquette of the ship. And this respondent further answering denies, that he was in the habit of striking, beating or swearing at the libellant for trifling causes, or otherwise; or that, to the best of deponent's recollection, he ever struck him at any other times than above stated, or that he ever treated him in a brutal or degrading manner, or sought in any way to disgrace him or to wound his feelings. On the contrary, this respondent says, that the libellant was treated with more kindness and indulgence than ship-boys usually are. That, on putting to sea on the said voyage, respondent called all hands aft, and gave them instructions and orders for the voyage, by which he forbid all swearing or fighting on board the said vessel, and forbid the officers of the vessel striking any of the men, except by respondent's orders, and their striking the boys under any circumstances, for the purpose of protecting the boys from the usage which it is common for them to receive, and that he never suffered the officers or crew to strike them at all. And defendant further saith, that he suffered the libellant to abandon the voyage and go on shore at Valparaiso, without any suspicion that the libellant had any ill-will or subject of complaint against this respondent. That, before reaching Valparaiso, libellant repeatedly stated to respondent that he was sick of the sea, and desirous to abandon the voyage, stating, among other things, that his health was improved, but he did not like the life. That respondent, finding the libellant was of no use on board, and, as respondent believed, would never make a sailor, freely consented to his going on shore and giving up the voyage, and referred him to the United States Consul for such certificate as would justify respondent in discharging him in a foreign port, which certificate was granted by the Consul, and the respondent thereupon discharged the libellant. That, after the libellant had left the ship, respondent repeatedly saw libellant, and had no intimation from him of any complaint against respondent. On the contrary, libellant voluntarily informed the respondent of the embezzlement of the ship's stores by the carpenter, which, he stated, he had been afraid to mention while on board, for fear of the carpenter. And defendant further saith, that as he is informed and believes, and therefore alleges, the said libellant, on his return to the port of New-York, had an interview with Mr. Perit aforesaid, by whom the situation for the libellant was obtained, and the libellant then stated that he had seen enough of the sea; and, on being asked by Mr. Perit how he was pleased with the captain, meaning

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passengers in reputable walks of life, who may be supposed to appreciate personal rights more justly; whilst the rest of the crew, and all the passengers, including a supercargo and the American Consul at Valparaiso, speak in unqualified terms of approval of the general deportment of the respondent in his command, and in regard to the libellant, so far as his situation came under their notice or they heard him speak of it. But, abating the exaggerations in the statement of the libellant's case, and making broad subtractions from the evidently prejudiced representations of two of his witnesses, the boy Childs and the carpenter, I think there is direct and unimpeached evidence, that on two or three occasions the respondent assaulted the libellant and committed violence upon his person, in a manner not justified by the proofs—first, in pushing the libellant forcibly across the deck, and accompanying the act with a blow or slap on the side of his head, for a breach of etiquette in walking on the weather side of the quarter-deck; again, in cuffing him for awkwardness or lack of activity in setting the pump to work;

this respondent, the libellant answered that he had no complaint to make against him, or words to that effect.

Wherefore this respondent prays he may be considered as justified in the premises, and be hence dismissed, with his costs, &c.

C. H. CHRISTIANSON.

J. Carr, *Proctor for Defendant.*

On this 2d day of December, 1884, before me personally appeared Christian H. Christianson, who, being duly sworn, says, that he has read, or heard read, the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information and belief, and, as to those matters, he believes it to be true.

Geo. W. MORTON,

U. S. Comm'r.

also, in twitching his head backwards and slapping him for failing to know and find a particular rope he was ordered to haul upon; also, in pulling off the libellant's belt, striking him over the shoulders with it, and throwing it overboard, in presence of the passengers, and taunting and deriding him for his clumsy and ungainly dress and appearance; and again, for striking him across the small of his back with a rope's-end, when he was stooping down in the effort to raise from the deck one end of a yard with a wet sail on it. The Court is very careful not to be carried away by the picture given in the libel of this last-named transaction, or by the dubious colorings applied to it by the testimony of the boy Childs, and of another sailor, because their testimony is inconsistent with the after conduct and representations of the libellant himself, and because their credibility as witnesses, if not legally impeached, is much impaired by the testimony of the passengers and of others of the crew. Yet, I cannot deny my belief of the fact that a blow with a rope was given at the time by the respondent. This is the substance of the credible proof in support of the charges in the libel. It may embrace another instance or two of like character; but no punishment of a more aggravated kind appears to have been inflicted on the libellant by the master.

The argument for the defence is, that if the master has not succeeded in wholly discrediting the evidence against him on this subject, he was justified in law for his acts, under the circumstances and in the relation of the parties to each other; and that, in respect to this minor, the master stood emphatically in *loco parentis*, and was empowered to correct him under the

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same immunity that a father may correct a child. The rightful authority of a master to correct a mariner at sea, for malconduct or culpable negligence on ship-board, is not now in debate. The libellant's action is put on the footing, that he was entitled to a privilege or exemption in this service, which distinguished his liability to the authority of the master from that of a common sailor; and, if not, that the punishment he received was excessive and cruel.

It is in proof that the libellant was about eighteen years of age, and of a delicate constitution, and was desirous of making a long sea voyage to benefit his health and learn navigation with a view to that profession. He was of highly respectable connections, and had been brought up in a distinguished family and with cultivated and refined tastes. He had never been accustomed to hard labor, and was entirely without experience of the exactions and hardships of seafaring life. From these considerations, his father and friends were opposed to his undertaking the voyage; but, yielding to his persistency, they obtained a berth for him on board the ship *Commerce*, commanded by the respondent. The libellant's father explained the young man's situation to the respondent, and besought for him treatment on board which might render the service useful and encouraging to him, and contribute to strengthen his constitution and health. The master was reluctant to receive him and another young man, his companion, of about the same age and position in society, alleging that sons of gentlemen were troublesome in merchant ships and proved to be poor sailors, and that the libellant, if he engaged in the voyage, would find the service more severe than he anticipated, and

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become dissatisfied with his position. He was, however, accepted as one of the crew, and signed shipping articles for the voyage as a boy. He was stationed in the steerage with the carpenter and another boy, and was not put in the fore-castle with the common sailors.

The old distribution of titles and rank amongst the ship's company¹ has, in respect to boys at least, gone into disuse in modern times. In American ships, cabin-boys, apprentices or pupils, and raw or green hands,

¹ "The Persons ordinary for sailing in Ships have divers Denominations: The first, which is the Master, known to us and by most Nations both now and of old, and especially by the *Roman Laws*, *Navicularius* or *Magister Navis*; in *English* rendered Master; or *Exercitor Navis*; in the *Teutonic* Skipper; by the *Græcians*, *Navarchus* or *Nauclerus*; by the *Italians*, *Patrono*. But this is only to those Vessels that are Ships of Burden and of Carriage; for to Ships of War the principal there is commonly called Commander or Captain. The next in order of Office to the Master, is he who directs the Ship in the Course of her Voyage, by the *French* called *Pilots*; by the *English* and *Flemming*, *Steersman*; by the *Romans*, *Gubernator*; by the *Italians*, *Nochiero Pilotto* and *Navarchus*, as *Gerettus* writes. The third is esteemed the Master's Mate or Companion, chiefly if the Master be Steersman himself; of old by the *Græcians* and *Romans* called *Proreta*; his Charge is to command all before the Mast.

"His Successor in order is the Carpenter or Shipwright, by those two Nations of old called *Naupegus* by the latter; by the first *Calaphates*. From the Loins of one of that Rank sprang that great Emperor *Michael*, surnamed *Calaphates*, who denied not to own the Quality of his Father among his Regal Titles. The very Name of *Chalaphate* the *Venetian* and *Italian* still use to this Day.

"The next who succeeds in order, is he who bears the Charge of the Ship's Boat, by the *Italians* called *Brachierie*; by the *Græcians* and *Romans*, *Carabita*, from *Carabus*, which denotes the Boat of a Ship.

"The sixth in order, especially in Ships of Burden, is the Clerk or *Purser*, by the *Italians* called *Scrivano*; whose Duty is the registering and keeping the Accounts of all received in or delivered out of the Ship; for all other Goods that are not by him entered or taken into Charge, if they happen to be cast overboard in a storm, or are stolen or imbezelled, the Master answers them not, there being no Obligation on him by Law for the same; his Duty is to unlade by Day, not Night.

"The seventh, a most necessary Officer, as long as there are aboard Bellies, sharp Stomachs and Provision, called the *Cook*.

"The eighth is the Ship's Boy, who keeps her continually in Harbours, called of old by the *Græcians*, *Nauphilakes*; by the *Italians*, *Guardino*: These Persons

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are all rated as boys, without regard to their ages. The full-grown man, if not an ordinary seaman, ranks as a boy. Cabin-boys are usually attendants upon the master or steward, are regarded rather as servants than as mariners, and are rarely put to general ship's duty. It is otherwise with apprentices or pupils; but, as they serve under special articles or hiring, their cases come less under the supervision of the law maritime than those of other members of the crew. In this case, the libellant was a boy, in a general and nautical sense. He was a raw hand, and, having signed the shipping articles, was subject to the rules and authority of the ship, in every respect, according to his capacity and experience, the same as an ordinary seaman. The master might rightfully punish him for delinquencies, in the same manner as a common sailor, and, when the misfeasance was of a kind to call for personal chastisement, there was nothing in his position which exempted him from its infliction. Nevertheless, the effect of the infliction of unjustifiable punishment upon a delicate, educated and sensitive youth, and upon a hardy seaman, inured to rough usage from officers and from his messmates, would be widely different, and the consequences to the master for the wrongful act ought not to be the same. In my judgment, it is proved in this case, that personal chastisement was applied to the libellant in several instances, where no necessity is shown for its infliction. It was administered for very trivial delin-

are distinct in Offices and Names, and are likewise distinguished in their Hires and Wages; the rest of the Crew are under the common Name of Mariners, by the Romans called *Nautae*; but the *Tarpollians*, or those Youths or Boys that are Apprentices, obliged to the most servile Duties in the Ship, were of old called *Mesonautae*." (1 *Molloy*, b. 2, ch. 3, pp. 341, 342.)

quencies, if the acts or omissions of the libellant could be so termed, and abruptly, without calling the libellant to explain his conduct, or giving him an opportunity to offer apologies or amends for it. Nor did the master pronounce it faulty, so as to afford a caution to the libellant or the crew against its repetition. The correction administered was the only admonition given, and in this respect the method of instruction was the same that it would have been if the libellant had been an irrational animal. This was unwarranted in law. A master has no authority to fall upon a mariner with blows for every inadvertency or act of misbehavior, unless the urgency to subdue him instantly or to resist some outrage threatened by him, be palpable. Nothing mutinous or violent or refractory, on either occasion, on the part of the libellant, is shown. I think it clear, upon the proofs, that the punishments complained of were exceedingly slight in kind, inflicted no injury upon the person of the libellant, and were only calculated to wound his pride and sensibilities. They do not, therefore, demand any startling reparation by damages, and, but for some circumstances peculiar to this case, the Court would feel constrained to award little beyond costs and nominal damages.

But the relation of the libellant to the master and to the ship presents considerations both of a general bearing and special to the case, which deserve notice. The government and discipline on board ships at sea being necessarily largely in the discretion of the master, Courts can exercise little more supervision than to see that the discipline is administered temperately, and with reasonable regard to the capacity, constitution and feelings of the crew. (*Rice v. The Polly and*

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Kitty, 2 *Pet. Adm. Dec.* 420.) If there arises a necessity for corporal restraint or punishment to individuals of the crew, the same measure of severity is not permitted towards the inexperienced, the feeble of frame or the improvident, as towards thoroughly trained, robust and perverse offenders. The libellant was under physical infirmities, of which the master was aware, which called for leniency and forbearance, if an order failed to be promptly and correctly fulfilled by him at the instant it was given. His eyesight was bad, he was of slender strength, he was timid in undertaking work which was strange to him, and he was awkward in learning. It should, accordingly, have been the occasion for careful teaching, or at most for reproof, if he failed to find or haul upon the right rope at once, or bungled in rigging up the pump, or went aloft clumsily or with hesitation, or was prone to cover himself with more clothing than was convenient to an easy and prompt action on duty, rather than for using a rope's end upon him, or boxing his ears, whether either produced bodily suffering or not. The offences set forth in the answer, in excuse of the corrections given to the libellant, appear to have been chiefly inadvertencies, or the results of ignorance, and his failure to lift at once the spar and sail for which he was struck across the back, if owing, in a degree, to the lack of a hearty good will for the work, must also be deemed, on the evidence, attributable in part to the weight of the spar and sail, compared with his actual strength. It appears to me, that every instance of misconduct or neglect alleged against the libellant was a fit subject for expostulation, caution or reproof by the respondent, and did not demand personal chastisement to correct the error or

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stimulate the libellant to a proper performance of his duties. If he was to be regarded and treated merely as a sailor, yet, as he was an educated and intelligent person, the master should have appealed to his reason and sense of right, to lead him to obedience, before resorting to blows.

The case presents another aspect, which should be adverted to. The libellant was making an experimental voyage, partly with a view to acquaint himself with navigation and the duties of a seaman, in order to qualify himself for that calling. It is of national concernment that the merchant marine should be supplied with men of intelligence and character, not only to officer the ship, but to fill every station on board of her. Nor is this consideration limited to the importance of having the ship's company made up of men competent, in every emergency, to navigate the vessel, and to deal intelligently with her lading, nor to the advantages to be derived by commerce and trade alone, from such a composition of a crew. Crews of American ships, if a creditable and true representation of American intelligence and morals at home, would abroad, wherever they went, become envoys more efficient than diplomacy or arms can send forth, in spreading arts, culture, religion and the love of peace and liberty. They would efface the disrepute attached, in a degree, to the calling of a sailor, and would render those who fill this vast field of enterprise on the high seas, common participators, in reputation and worth, with the merchants whose business they transact. The country has thus a deep interest in encouraging young men of capacity, ambition and good character, to seek employment in the merchant marine,

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and in having the ship of the merchant, like his counting-house, become a school to his employees, for the culture of general intelligence and refinement of manners, together with a thorough knowledge of their special pursuit. The coarse and rude usage which the libellant received from the respondent is not, then, in my judgment, to be estimated solely by the consideration of the positive bodily harm which accompanied it; but the misconduct of the respondent is to be measured with some regard, also, to the broader interests, both those of navigation and those of a public nature, affected by it, in view of its tendency to deter sensitive and worthy young men from entering the merchant's service as mariners. Nor is it to be overlooked, that, in appreciating the wrong received from torts of the description proved in this case, the wound to the libellant's pride and self respect is entitled to weight, in determining the damages to be awarded him.

Although, then, I hold the respondent acquitted of any wanton maltreatment of the libellant, and of any intentional cruelty towards him, and of any design to disgrace and humiliate him by the mode of punishment adopted, and although the actual injury received by him therefrom was inconsiderable, and was not made matter of complaint on board, yet the respondent was culpably in fault in using force upon the libellant, on the occasions where moderate reproof and admonition or plain instruction to his inexperience was all the correction his delinquencies seem to have demanded. The humiliation and suffering to the libellant's feelings, in being subjected to corporal punishment, must have been greater than would have been experienced by a lad brought up roughly and with associates accustomed

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to like treatment; and this consideration will properly enter into the estimate of damages.

A master of a vessel, under the imputed authority of a parent over his crew, or even over mere boys under his charge, cannot claim the exemption or immunity which a father enjoys, to chastise a child at his discretion, without responsibility to the law, by punishments other than such as are cruel and injurious to the life or health of the child or are a public offence. On the contrary, a ship-master is liable directly to a minor for every personal tort committed upon him without legal justification.

The considerations before suggested will, in this case, augment the damages beyond a mere remuneration for the bodily injury sustained by the libellant, but will not entitle him to vindictive or aggravated damages. I shall decree him \$100 damages and his costs.

Decree accordingly.

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The non-joinder of proper respondents in an action *in personam* can be taken advantage of only by plea in abatement.

The practice of Courts of Admiralty admits matter of abatement to be set up in the answer, but the answer must, in such case, demand the same judgment, and be subject to the same rules, as if a formal dilatory plea had been employed.

Where, in a suit *in personam*, a respondent cannot be arrested, a foreign attachment may issue against his property in the hands of third persons, to compel his appearance; and such process is appropriate, in Admiralty, for that purpose alone.

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Where, in a suit in Admiralty, property in the hands of a third person is arrested, on a claim to a specific lien upon it, that constitutes the suit a suit *in rem*; and it is not a foreign attachment, whether the third person holds the property as owner of it in his own right, or as trustee of the debtor.

A foreign attachment supposes that the property proceeded against belongs to the debtor, and not to the garnishee, and seeks to make the garnishee the debtor of the libellant, to the value of the property, in case the primary debtor does not appear in the cause or satisfy the decree.

Property purchased *bona fide* by the holder of it, is not subject to a foreign attachment; but a proceeding against it must be sustained as one strictly *in rem*.

A suit *in rem* imports, *ex vi termini*, that a particular thing is chargeable with the demand and is subject to arrest therefor.

Where, before the institution of a suit *in rem*, the thing proceeded against in the libel had been deposited with or acquired by agents, with full notice to them of the libellant's claim upon it, and on its arrest the agents intervened in the suit by stipulation, and answered the libel at large: *Held*, that the suit might be treated as a suit *in personam* against them.

Agreements by which seamen are to receive for their services a share of the profits of the voyage, are not partnerships, but contracts of hiring, and the shares so agreed upon are wages, and are recoverable as such; and this is so whether the compensation is to be made in kind or in money.

Under shipping articles for a fishing voyage, which give to the seamen shares of all that shall be obtained during the voyage, to be received by them as soon after the arrival of the ship in her home port as the voyage can be made up, they become entitled to shares only in so much cargo as is brought safely to the home port.

If, under such articles, part of the cargo be lost on the voyage home, the seamen are entitled to receive their proportions only out of the residue which arrives home in safety, and not out of the original cargo.

The maritime law does not render the ship-owner, in any sense, an insurer for the safe delivery of such cargo; and the seamen's wages, if consisting of a share of the cargo, must depend upon the successful termination of the voyage.

Where goods are saved and brought into the port of destination by salvors, the ship-owner is not entitled to freight on such goods; nor can the seamen recover wages, as such, though the salvage be effected in part by their services.

If a seaman does not claim wages in such case, but claims a proportion of the cargo, as quasi owner of it, that interest may be equitably secured to him, subject to the proper charges for salvage and transportation; or, having participated in the salvage service, he may, as salvor, claim a part of the cargo, proportioned to the value of his wages.

Where seamen contract to be paid by a share of the freight or of the proceeds of a voyage, they cannot, in case of wreck, claim compensation for salvage services, or more than day wages for the time actually employed in saving the wreck.

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The 6th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 134,) which provides that all the seamen having cause of complaint of the like kind against the same ship or vessel shall be joined as complainants, if not imperative upon all the seamen to join in a prosecution already begun by a shipmate for the wages of a common voyage, at least removes all occasion for separate actions, and all equity to costs, where such separate actions are instituted.

An after action by a seaman, nominally *in rem*, but so ineptly shaped as to become, in effect, an action *in personam* against the agents or trustees of the owners, will not carry separate costs to either party.

August 2d, 1836.

THESE actions, one *in personam*, against Hussey, a part owner of the ship Franklin, and the other *in rem*, by John Monroe, against the remnants of the ship and the proceeds of part of her cargo, were brought by two seamen to recover wages for their services on board that vessel, on a whaling voyage to the Pacific Ocean, and also salvage for saving portions of the apparel and cargo from her wreck, on the coast of Brazil.

It appeared that, in June, 1831, the Franklin sailed from Nantucket on a whaling voyage. The libellant Reed, went out in her. The other libellant, Monroe, shipped at Callao, Peru. Each of them signed the shipping articles, by which Reed was to have a lay of one one hundred and twenty-fifth, and Monroe a lay of one one hundred and twentieth, "of all that shall be obtained during the voyage." Nantucket was the home port of discharge. The ship obtained, during her voyage, from 1,300 to 1,350 barrels of oil, 100 barrels of which were shipped to the United States in another vessel, and were received and sold by the owners. In March, 1834, the Franklin left the whaling ground and sailed for the United States. The master, the mate and five seamen died on board, between Cape Horn and the Falkland Islands, and the command devolved

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on the third mate, who put into Monte Video in distress. The vessel remained at that port about a month refitting, and having, with the assistance and advice of the Consul, shipped there a first mate and five seamen, at monthly wages, sailed for the United States about the middle of August, 1834. On the 5th or 6th of October, about midnight, she was wrecked on the Diego Roderiguez Shoals, off Coraipa, on the coast of Brazil. She struck upon a rock about six miles from shore, and bilged, and was entirely lost. With the assistance of lighters and persons from the coast, and with the aid of her crew, three anchors and a part of her rigging and a quantity of the oil which composed her cargo, were got on shore. During the period they were at work on the wreck, the upper works of the ship broke off in a gale, and were driven ashore, carrying 150 or 200 barrels of oil. In all, 450 barrels were saved. The oil, in many of those which reached the shore, was lost from leakage.

The persons who were employed in saving the cargo were engaged at first under the authority of the British Consul, and, subsequently, under that of the American Consul, as soon as his interference could be obtained. The master stated in his testimony that the crew were employed for forty-five days in saving and securing the cargo, about a fortnight of which time was employed on the wreck. The persons hired on the coast were paid sixty-two and a half cents per day. Laborers were abundant at that price. A vessel was chartered, which brought to New-York the oil saved and the remnants of the ship, and they were all sold at auction, under the direction of Josiah Macy & Sons, who were the claimants of the proceeds of the oil, as agents or

trustees of the owners. The nett surplus, over and above all disbursements, held by them for the owners, was about \$717. The expenses of saving the property and transporting it to this country were all discharged by the American Consul. The ship's company, except the libellants and the master, were discharged at the place of wreck, their claim of wages being satisfied by the Consul. Those payments were brought into the account as part of the charges and disbursements. The oil was worth at the place of wreck twenty cents per gallon, and would not, if sold there, have defrayed the expenses incurred there.

Both of the libels charged that the ship was intentionally run on shore and wrecked by the master. The evidence in support of this allegation consisted only of the testimony of the libellants themselves, each testifying for the other. The other facts are sufficiently set forth in the opinion of the Court.

John A. Morrill, for the libellants.

Charles Walker, for the claimants and respondents.

BETTS, J.—The libellants present their demands under two aspects: (1.) That they are entitled to recover the value of their respective shares in all the oil obtained during the voyage, notwithstanding the shipwreck; or (2.) That they are entitled to an allowance for salvage services, equivalent to the wages they would have received had the whole cargo been delivered in this country. The claimants and respondents urge, against the maintenance of the actions, some objections which apply in common to both suits, and

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some which apply only to the one or the other of them.

It is contended, that if the libellants will be ultimately entitled to recover wages, their right was not mature when the suits were instituted, as the owners had not then received the nett proceeds and made up the voyage, even admitting that, under the articles, the libellants could recover without showing the arrival of the ship at Nantucket. The seamen are, by the articles, entitled to their wages "so soon as the oil can be sold and the voyage made up by the owners." It does not become necessary, however, to advance any opinion as to what may be regarded, in behalf of seamen, as a satisfaction of this condition; for the proof is, that all the oil was, in point of fact, sold before these suits were brought. There is also ground for reasonable presumption, that the accounts of the voyage were made up within the purview of the articles; because, it appears that a statement was given to the seamen, by the owners of the ship, of the proceeds of the voyage and of some small balance due them, which was offered to be paid. One suit was brought on the 9th of March, and the other on the 14th. The oil had been all sold, and the proceeds accounted for to the owners of the ship, on the 7th. There would, therefore, seem to have been a compliance with the articles to the letter, on the part of the libellants; and, their right of action being perfect, the Court cannot deny them the benefit of it, on account of any unnecessary hastiness or ill-temper evinced in commencing the suits.

The other objections to the suits are, that the action *in personam* cannot be maintained against Hussey alone for the recovery of the whole of Reed's wages; and that

the action *in rem* cannot be sustained, because it is not founded upon the arrest of any property in possession of the claimants, which is subject to the charge sought to be enforced against it.

If the objection because of the non-joinder of all the owners in the action *in personam*, can be made available in this Court, that can only be done by means of a plea in abatement, or of an answer having the constituents of such a plea. (*Abbott on Shipp. ed. 1829, 82, and note.*) The answer sets up the fact that Hussey is only one-eighth owner, and gives the names of the other owners, but does not take exception to their not being joined in the action. If the practice of the Court permits matter appropriate to a dilatory plea to be brought forward by answer, yet the answer must demand the like judgment, and be subject to the same proceedings, as if a formal plea had been employed. This objection, therefore, cannot be maintained, and the action may proceed against the single defendant as if he were the sole owner.

The argument in opposition to the other objection is founded upon the assumption that the suit by Monroe is a proceeding by way of foreign attachment. But that could not have been the object of the attachment, because Hussey had been already arrested and held to bail in the suit against him *in personam*; and an arrest of his goods by foreign attachment would have been useless and nugatory, because his actual appearance fulfilled all that could have been exacted under that attachment. (*Rules 25, 26, 27, ed. 1838.*) Besides, the action is impetrated against the oil and the remnants of the wreck, as being specifically subject to the claims of the libellant. The libel sets forth

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a case which, upon the face of it, entitles the party to hold the remnants of the wreck for the satisfaction of a part, if not the whole, of the demand, and makes out a strong probable right to attach the oil also. It alleges a sale of the oil to Josiah Macy & Sons, and obviates any privilege they might claim in the character of purchasers, by averring that the "sale was made to them, and that they purchased, with full notice of the claims of the libellant," and prays process of attachment against the specific articles sold, "and also against the goods, chattels, credits and effects of Frederick Hussey, to compel his appearance." This, then, is a regular suit *in rem*. It goes against property in possession of the respective claimants, upon an allegation of its liability to the claim, and is accompanied with a monition to those parties to appear and answer the libel under oath. The right to maintain it must be tested, then, by the rules which are applicable to actions *in rem*, founded upon a lien on the thing arrested.

The advocate for the libellant contends, that the appropriate steps were taken in this manner, by foreign attachment, to compel the appearance of Hussey, by impounding the proceeds of his property in the hands of third persons. This is clearly a misapprehension of the proper mode of proceeding. The right to a foreign attachment is not to be determined from the frame of the libel, because the libel need not demand one. Such an attachment is required when a personal arrest of the defendant cannot be made, (*Rule 25, ed. 1838; Hall's Adm. Pr. 60 to 70,*) and is, therefore, founded upon the return of the marshal to the warrant of arrest. The libel prays, in a loose and

indefinite way, an attachment against the goods, chattels, credits and effects of Frederick Hussey, to compel an appearance. Yet process in conformity to that prayer would not authorize the seizure of property, unless it was in Hussey's actual or constructive possession. Neither the rights nor the possession of a third party could be interfered with or disturbed under a warrant couched in terms so latitudinarian and uncertain. If Hussey's property, in the hands of third persons, was sought to be seized, the names of the holders and the purpose of the proceeding should have been specified, to constitute them garnishees and to make the foreign attachment a regular means of redress. It is manifest that the property of Josiah Macy & Sons is not subject to arrest, to compel the appearance of Hussey; yet, that is the bearing and object of the proceeding as it is interpreted by the libellant's counsel. The right of property in the oil, as between Hussey and Macy & Sons, is asserted to be in the latter. It would, then, be most inapt and irregular to arrest their property, with a view to coerce Hussey's appearance. It would be no prejudice to him if their property should be sequestered for his debt; and, therefore, a *distringas* upon that property, with intent to compel his appearance in the cause, would never be permitted by the Court. No credits or effects are pointed out in the libel as existing anywhere and belonging to Hussey, which might be subject to arrest by the attachment asked for; nor is it averred that the proceeds of the things claimed, if they be sold, are held by Macy & Sons as the funds of Hussey. A foreign attachment operates, by force of law, to render the garnishee, instead of the respondent, the debtor or depositary of the libellant; and it can

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have no foundation except in relation to effects and credits which actually belong to the respondent. (*Clerke's Praxis*, by Hall, *tit.* 28, 32, and notes; *Manro v. Almeida*, 10 Wheat. 473; *Bouysson v. Miller*, Bee's R. 186.) Had the regular course of practice been pursued in the present case, the garnishees would not have been put to the expense of appearing in and contesting a suit to which they are made parties, but would have been acquitted of all responsibility on conforming to the rules of this Court in that behalf, (*Rules* 28, 29, 40, *ed.* 1838,) and filing the proper affidavit or stipulation. Those rules are designed to relieve parties who have no interest in a controversy, from all expense or inconvenience in respect to funds in their hands, which are the subject of conflicting claims between others. If the order of the judge endorsed upon the libel, "that process issue, according to the prayer thereof," was obtained with a view of complying with the 28th rule, still, it must appear that the prayer presents a case for a foreign attachment; otherwise, an order in such general terms will not authorize its employment. The order would rather seem to indicate that the libellant was allowed, upon the case he presented, to arrest the property of third persons because it was acquired by them with full notice of his rights and liens, than to constitute them debtors to or garnishees for him because of their being in possession of such property or its proceeds for him.

It now appears most manifestly, that the libellant well knew, when his suit was instituted, that the oil and effects saved from the wreck were none of them in the possession either of Hussey or of Macy & Sons, but had all of them been previously sold at public

auction by a regular auction house, and that the proceeds of the sale came in that manner into the possession of Macy & Sons ; and that, therefore, there was no foundation for a suit *in rem* against the oil *in specie*. That form of action imports, *ex vi termini*, a thing to be arrested. Where none exists, the action is as inapt and fruitless as a warrant *in personam* would be against a party who had never been within the jurisdiction of the Court, or against one who was deceased. The process, in the present case, did not go against the proceeds in the hands of Macy & Sons, and they might, therefore, have disregarded the monition, (the suit not resting upon any personal responsibility of theirs independent of the property to be attached,) and not have appeared to the action, being no way required to do so by the mandates of the Court. All the parties having, however, elected to appear, by proper stipulations, and to answer the libel at large, the Court may consider the case as placed upon the same footing as if the property demanded had been attached and the claimants had intervened in respect thereto ; and, if a clear right is established by the libellant to obtain relief, or to receive the funds held by Macy & Sons, such relief may be given, notwithstanding the informalities and inaptitudes of the mode of procedure. The formal objections to the maintenance of the actions are, therefore, overruled.

As the second suit does not rest upon any attachment of property, but solely on the appearance and stipulations of the claimants, it becomes, in effect, nothing more than a suit *in personam*, entitling the libellant to no other remedy than if he had instituted it only by citation or by personal arrest of the parties ; and,

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therefore, in the disposition of the costs of these suits, the question both as to the necessity and the right of these double actions will be considered.

The extent of the right of the libellants in the oil taken on the voyage, forms the merits of their cases, and must be considered and disposed of. Two propositions are advanced by them : (1.) That they are entitled to recover an equivalent for their full lay or share in the entire quantity of oil taken and laden on board, without diminution on account of losses by wreck or by perils of the sea ; (2.) Or that, if their right is limited to the quantity saved from the wreck, they are entitled to full shares in that, without bearing any of the charges at the place of shipwreck, or in the transportation of the oil from Brazil to this port.

The libellants contend that they are entitled to full wages, upon the terms of the contract and the principles of maritime law, and also because the ship was designedly stranded by the master, and the stipulated termination of the voyage was thus prevented by an act of malfeasance for which the owners are responsible. The Court will not now assume to decide what the rights of seamen may be in such a voyage, when the vessel is voluntarily wrecked by the master, or is lost through want of skill or culpable neglect. There will, probably, be no serious difficulty in discovering the principle which should govern a case of that character, when it occurs. It is sufficient for me to say now, that, in my opinion, the libellants prove no misconduct or want of seamanship and precaution in the navigation of this ship at the time of her disaster.

The right to full wages is placed mainly, however, upon the supposed tenor of the shipping articles, and

upon the assumption that the hazard of the transportation of the cargo was thrown exclusively on the ship-owners. Agreements by which seamen are to participate in the adventure, and to derive their reward from its success, are now rare, and are probably limited, in commercial experience, to privateering and fishing voyages. (*Abbott on Shipp. ed. 1829, 432; Barney v. Coffin, 3 Pick. 115; Baxter v. Rodman, Id. 435.*) But, anciently, it was a very usual, and apparently the original method of hiring. (*Laws of Oleron, arts. 3, 8, 16; Laws of the Hanse Towns, art. 24; Ordinances of Louis XIV. b. 3, tit. 4. art. 7; Jacobsen's Sea Laws, 132.*) Such agreements do not constitute partnerships, but are merely a hiring of the seamen, and the shares agreed upon are wages, and are recoverable as such; (*Abbott on Shipp. ed. 1829, 432, note; Wilkinson v. Frasier, 4 Esp. 182; The Frederick, 5 Rob. 8; Anon. 1 Pet. Adm. Dec. 205, n.; 3 Kent's Comm. 185; Barney v. Coffin, 3 Pick. 115;*) though Pothier styles them a species of contracts of partnership. (*5 Poth. 360; Cont. du Louage des Matelots, 161.*) Upon these principles, then, the shipping articles, whether stipulating a compensation in kind or in money, would be subject to the same rules of interpretation, and, in securing to seamen like rights, would also subject them to the same duties and obligations. By the articles in the present case, the seamen engage to perform the whaling voyage specified, in consideration of the shares or lays to be paid them, and the owner promises, upon these conditions, to pay the shares of the nett proceeds of all that shall be "obtained" during the voyage, as soon after the return of the ship to Nantucket as the oil can be sold and the voyage be made up. The performance

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by the seamen is in substance a condition précédent to the payment to be made by the owner, and is made rather more distinctively so by the restrictions as to the time and place at which the owner's responsibility shall attach, than is imported by the ordinary stipulations in a shipping contract. This Court may undoubtedly, in the exercise of its equitable powers, dispense with a literal fulfilment of the conditions in this description of engagements, and may regard acts which are substituted by agreement, express or implied, between the parties, or which are compelled by the exigencies of the voyage, to be equivalent to an exact compliance with the articles; (*The Minerva*, 1 Hagg. 347; *The George Home*, Id. 376; *Harden v. Gordon*, 2 Mason, 541;) but still it must search for and require an observance of the contract in its essential features, as it is the contract alone which creates or gives efficacy to the rights of the parties.

But it is supposed that there is a peculiar force in the expression "obtained," used in the articles, which secures to the seamen a right to be paid their lays in all the oil taken and laden on board the ship during the fishing voyage. This term is not to be construed *per se*, without regard to its context in the contract; and, if it be read in reference to the subject-matter, there can be no ground to doubt that it has relation to the entire period of the service, the completion of the service being an essential part of the undertaking, and a consideration for the wages to be paid. The agreement of the sailors was not merely to take fish, nor was the contract of the owners to pay the stated compensation for that service alone. The contract on one side was, to perform a voyage, consisting of the

outward run, the fishing service and the return to the port of discharge; and the contract on the other side was, to pay the lays stipulated, when they should be adjusted, on the completion of the voyage. The contract incontrovertibly imports, that the products to be shared are not "obtained," within the contemplation of the parties, until they are brought safely to the port of destination. This construction of the articles also necessarily results from the relationship of the seamen to the subject-matter. They have no property in the oil itself. They cannot claim to have aliquot parts measured off and delivered to them, either abroad or at home, as being joint owners of the commodity. Both by the terms of the agreement, and by the rules of the law maritime, their interests rest alone in the *proceeds* realized from the sale of the articles obtained. (*Abbott on Shipp. ed.* 1829, 432, *note*; 3 *Kent's Comm.* 185; *Wilkinson v. Frasier*, 4 *Esp.* 182.) It is also to be considered, that this was a contract for an entire voyage, and that, in such a case, upon general principles, seamen cannot claim wages for the performance of a part only, unless there has been freight earned before reaching the final port of discharge. (*Abbott on Shipp. ed.* 1829, 447, *and notes*; *Giles v. The Cynthia*, 1 *Pet. Adm. Dec.* 203; *The Two Catharines*, 2 *Mas.* 319.)

It is supposed, that because the owners are bound to furnish a sufficient ship for the service and the voyage, they are obliged to bring back, at their own risk, the cargo procured in the adventure—that, in effect, they become insurers for the safe delivery of whatever is put on board. This is not a stipulation of the contract, and there is no known principle of maritime law which imposes or sanctions such an obligation. By the

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American and the English law, the seamen's right to recover wages depends upon the successful termination of the voyage; and a loss of the voyage, by wreck or capture, takes away, as a general rule, their right to claim wages, (*Abbott on Shipp. ed.* 1829, 457, and *note*; 3 *Kent's Comm.* 188; 1 *Bell's Comm.* 512,) except where the owner is entitled to freight *pro rata itineris*; (*Luke v. Lyde*, 2 *Burr.* 882; *Laws of Oleron*, art. 4;) and, in that case, the better modern doctrine is, that seamen, whether hired for the voyage or by the month, can claim *pro rata* wages. (3 *Kent's Comm.* 189; 1 *Bell's Comm.* 512 to 515.) This principle may secure them a proportionate compensation out of the 100 barrels of oil transmitted home by another conveyance, and received by the owners; but it has no application to the main cargo.

That a sound construction of the contract will only entitle the libellants to their shares of the oil brought to the home port, is further illustrated by a consideration of the principle by which the right to wages is made to depend on a participation in the earning of freight. Upon that principle, the seamen recover their wages only on the safe performance of the voyage, because in that event alone does freight accrue. *Roccus* says, that when the sailor has an interest in the freight and cargo in lieu of wages, and the ship sustains an injury from accident, or the mariner does not perform the voyage, he is bound to contribute to the loss, and cannot recover wages. (*De Nav. note* 43, *Ingersoll's Transl. p.* 46.) The regulations of the *Laws of Oleron* were of like import. The seaman who hired for part of the freight, was obliged to continue with the master to the port of destination. (*Art.* 19. See, also, *Articles*

8 and 16, and *Oleirac's* observations therein, as illustrative of the character of these contracts.) The *Ordonnance of Louis XIV.* directs that seamen going by the profit or freight, shall not pretend to any wages for equipping, or damages if the voyage be broken up, retarded or prolonged by a superior force, whether before or after the departure of the ship. (*Liv. 3, tit. 4, art. 7.*) Because, as *Valin* observes, the crew are bound to abide the good and bad fortune, and run all the risks of the ship. (1 *Valin's Comm. sur l'Ord.* 700.) And, in case some freight is realized by the ship, the mariners participate in that, according to the terms of their contract; (*Ord. liv. 3, tit. 4, art. 9;*) and *Valin* says, their compensation or wages are limited to that portion. (1 *Valin, ad loc.* 703.) *Pothier* is manifestly of the same opinion, as he declares the contract to be a copartnership. (5 *Poth.* 360, *Cont. du Louage des Mat.* 161.)

It seems, then, that there is no foundation in the shipping articles or in the principles of maritime law, to sustain the claims of these libellants to full shares in all the oil laden on board during the voyage; that their compensation depends upon the proceeds realized from it here; and that they bear the risks of the perils of the sea in its transportation home. This is more appropriately so in relation to voyages like the one in question here, inasmuch as the law allows the seaman to effect insurance on the oil after it is laden on board, (1 *Phill. on Ins.* 55,) while such security is prohibited in regard to money or wages. (*Hughes on Ins.* 15.)

With respect to the 450 barrels of oil saved from the wreck, and brought to this port in a vessel chartered for the purpose, I shall hold that the libellants are entitled to their lays out of its nett proceeds. The

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general principle is, that goods brought in by salvors, although the ship's company were chiefly instrumental in effecting the salvage, do not entitle the ship-owner to freight, nor the seamen to wages, because the delivery of the goods is not made in pursuance of the contract. (*Dunnett v. Tomhagen*, 3 Johns. 154.) The distinction may, however, I think, be taken between that case and the present one, that, when goods are brought in by salvors, the contract of affreightment is superseded and annulled by the salvage service, and the owner cannot be required to satisfy both the ship-owner and the salvor; whilst here, the demand of the seaman is in the character of *quasi* owner, being for part of the thing produced, and he has to bear, together with the other owners, the charges of salvage, and those of new affreightment when the goods are not transhipped by the original ship-owner. But the right to compensation out of the salvaged property may furthermore be deduced from the rule, that every part of the vessel and of her freight saved by the aid of the seamen, is bound for the payment of their wages, and that it matters not whether the recompense be made in the name of wages or as salvage. (*Abbott on Shipp.* ed. 1829, 451; *The Neptune*, 1 Hagg. 227, and foreign ordinances there cited; 3 Kent's Comm. 195.) The recovery must be limited, however, to the nett proceeds, and cannot cover the value of the oil here, free from the charges for salvage and transportation. The voyage, as to the shipping adventure, ended with the shipwreck. This is a case of superior force, spoken of in maritime codes, which breaks up the contract, and deprives the seamen of the wages agreed upon. They have an equity, however, proportionate to their de-

mands, which adheres to whatever portion of the cargo may be realized here; (1 *Valin's Comm. sur l'Ord.* 703; *Code de Commerce*, liv. 2, tit. 5, No. 259;) and, to that extent, this Court will protect their rights in this case. They are subject to a share of the charges, because it is principally on account of their liability to bear those charges, that the rule which deprives them of all claim to wages, on the loss of freight voyages, is not deemed to apply to fishing adventures.

The libellants demand a salvage compensation for their services in rescuing the property from the wreck and securing it on shore. They were employed about forty-five days before the goods were re-shipped, and about a fortnight on the wreck. The rule seems to be invariable, however, that seamen who are compensated by a share of the freight or of the proceeds of the voyage, cannot, in case of wreck, claim for salvage service. The only extra compensation they can demand is, to be paid by the day for the time they are engaged in saving the wreck. (*Laws of Oleron*, art. 3; *Ord. de Marine*, liv. 3, tit. 4, art. 9; 1 *Valin's Comm.* 703; *Code de Commerce*, liv. 2, tit. 5, arts. 260, 261.) The daily wages of laborers at the place of wreck were sixty-two and a half cents. I shall, however, consider the services of the crew as much more valuable. They were more under the control of the officers, and were stimulated by a common interest to exert themselves with greater activity and more usefully than laborers picked up along shore. The services actually performed by them were in a high degree laborious, and, to a considerable extent, perilous to themselves. For these reasons, I think two dollars a day, for fourteen days, ought to be allowed to each of the libellants.

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The recovery of the libellants, then, will be as follows : To each his share, according to the articles, in the nett proceeds of the 100 barrels of oil sent home during the voyage ; and to each his like share in the nett proceeds of the 450 barrels of oil sold at this port, with the privilege, on the reference before the clerk, of surcharging with respect to the amounts of the expenses and disbursements against the property, if they shall be advised that they ought to be exempt from bearing any parts thereof, or that the charges are excessive. A reference will be ordered to the clerk, to ascertain the amount to be decreed in conformity to these principles. Monroe will be allowed no costs in his action. It has already been shown that that suit is, in effect, an action *in personam*. Accordingly, the remedy in the two suits is concurrent and identical, and no reasonable cause is shown for having separated them. Both were brought by the same proctor, nearly simultaneously in point of time, and both of the seamen could have joined in one suit. The practice of this Court, in conformity to the spirit of the statute, (*Act of July 20th, 1790, § 6, 1 U. S. Stat. at Large, 134,*) is, to allow any of the members of a crew to come in, on summary petition, and enjoy the advantages of a prosecution instituted by a shipmate, to recover the wages of a common voyage. If the act is not to be construed as imperative, and as compelling the union of all the mariners in one suit, to recover the wages of the same voyage, it, at all events, removes every occasion for different actions, and takes away all equity to costs when different actions are instituted. Had the claimants in the suit *in rem* been arrested, or their property been attached, so as to compel their appearance, I should have

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awarded them costs against the libellant; but, as their defence has been wholly voluntary and gratuitous, it ought not to entitle them to charge the expenses upon the sailor. Whether the libellant in the other action shall recover or pay costs, will be reserved for consideration until the coming in of the clerk's report.

Decree accordingly.¹

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Under the maritime law, there can be no desertion by a seaman, working a forfeiture of wages, unless there is an abandonment of the ship and of her service, with an intent not to return.

The act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 181,) varies that qualification of the offence, supplies a new definition of it, prescribes the manner in which it must be proved, and fixes an inflexible punishment.

Under the maritime law, Courts of Admiralty could mollify the penalty of absence without leave, and of desertion, and could do so upon evidence mitigating the offence, or showing the repentance of the deserter, at any reasonable time after the offence.

The statute inflicts an absolute forfeiture of wages in both cases.

The construction of the statute, considered.

The mode of proof appointed by the statute must be strictly followed, in all particulars.

A seaman has, under the statute, forty-eight hours to return to his vessel, after having absented himself from her without leave, and does not incur a forfeiture of wages if the vessel departs from the place before the expiration of the forty-eight hours.

¹ This case was appealed to the Circuit Court, where Judge Thompson held, (December 20th, 1837,) that the decision of the Court below was in all respects correct, upon the proofs adduced before it. But, on the new proofs given on appeal, the Court ordered a decree for the claimants and respondent on the merits. As, however, no reason was shown why those new proofs had not been given on the hearing in the Court below, the decree for the libellants (which included taxed costs to the libellant Reed) was modified, by deducting from it \$138, and neither party recovered against the other costs on the appeal.

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If a seaman has permission from the second mate to go on shore, and acts in confidence upon such permission, he is not absent without leave from the commanding officer, although the chief mate or master is, at the time, on board.

Such permission to go ashore may be implied from the acquiescence or silence of the officers in command, or of the master on shore.

Where a seaman goes ashore temporarily, intending to return immediately, and makes all reasonable efforts to do so, if the master, knowing that he is on shore, prevents his reaching the ship, and the seaman is thus left in a foreign port, he is entitled to recover full wages for the voyage.

He can also recover the value of his wearing apparel and effects left on board the ship, and taken away in her, and not restored to him.

September 17th, 1836.

THIS was a libel *in rem*, by Peter Johnson, Harman Retan and William Brown, three of the crew of the ship Union, for wages for a voyage from New-York to Liverpool and back, and for the value of three chests of clothing. The libellants alleged, that they performed the voyage out, doing their duty in all respects, and unloaded the vessel at Liverpool, and loaded her for her return; that, whilst lying at Liverpool, the crew boarded on shore; that, on the 11th of August, 1836, the libellants had permission from the first officer, the master not being on board, to go on shore for their dinners; that they returned after an absence of twenty or thirty minutes, and found that the vessel had left the pier, and was lying off and on a short distance from it, and so near that they could distinguish persons on board; that they made signals to the vessel, and applied to the boat tending her to put them on board; that the boatmen refused, saying, that the master had given orders not to take them on board; that they remained on the pier, making all possible exertions to get to the ship, till she made sail, leaving them behind, and taking away all their clothing; and that the American consul took charge of them, and they

returned to New-York by the way of Savannah, working their passage, and receiving no wages.

The claim and answer admitted the hiring for the voyage out and back, and the service and good conduct of the libellants on the voyage out, and on board until the 11th of August, and alleged, that while the master was on shore that day, making arrangements for the sailing of the vessel, the libellants went on shore and left the vessel, without the permission or consent of the first officer, and were forbidden by him to go on shore, and went with his knowledge, but in disobedience of his orders, and not intending to return. The claim and answer further alleged, that the cook and steward deserted the vessel the same morning; that, when the libellants left, there was no dinner cooked for them, but dinner was prepared on board at about two o'clock in the afternoon; that, at about half past eleven o'clock in the forenoon of that day, the vessel had hauled out of the dock to the pier-head, had all her sails hoisted, took a pilot on board, and was ready for sea, only waiting for the master to come on board; that the libellants well knew this, and also the necessity for leaving port when the wind and tide were favorable, as both then were; that, at about twelve o'clock, the libellants left the vessel; that, at about one, she was ordered off the pier by the dock-master; that, at half past one, the master came on board, and was informed of the absence of the libellants; that, in consequence of their absence, the vessel lay to in the stream, backing and filling, and waiting for them, till near three o'clock; that nothing detained the ship but their absence; and that she would have put to sea immediately on the master's coming on board, but for

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that absence. The answer also denied that the libellants returned to the pier-head within half an hour after they left the vessel, and averred that the claimants did not believe they returned whilst the vessel lay off and on in the stream; that the master returned to the pier-head at a quarter past one, and that neither of the libellants was then there, nor did he hear of their having been there. The answer also denied that the libellants hailed the vessel or made signals, as, from the situation of the vessel, the signals could not but have been seen, especially as a telescope was used for the purpose of ascertaining whether the libellants were in sight. The answer also denied that the libellants endeavored to get a boat or be put on board, as they could easily have procured a boat. It also denied that any boatmen refused to put them on board, and that the master gave orders to any boatmen not to bring them off. It further averred that the master gave the shipping-master, who went ashore in the boat, orders to bring the libellants off, and, if they could not be found, to get others in their places; that no particular boat tended the ship; that the master was put on board only a few rods from the pier; and that, on the same day, the mate made an entry in the log-book, as follows: "At twelve, Pet. Johnson, Harman Retan and Will. Sands left the vessel without permission, after being forbid so to do." The answer also denied that anything was due to the libellants or to either of them, on account of wages, or that they had a right to receive anything for wages or clothing, as was sought and prayed by the libel, and insisted that the libellants had, by their desertion, forfeited all their wages and

clothing, and all other things claimed by them, and all right to recover for the same.

Voluminous proofs had been taken in this country, and under commissions to England, in a suit between the United States and the present claimants, for not fulfilling the stipulations of the bond executed by them at the custom-house in New-York, for the return of the libellants in the ship. That cause had been tried before this Court and a jury, and a verdict had been rendered in favor of the United States at the present term, and it was agreed by the counsel for the respective parties in this case that the proofs and arguments adduced on that trial should be regarded as addressed to the judge on this hearing, and be considered as applying to this case. The testimony and depositions thus adduced were, in many respects, discordant with those taken in the present case, and were in direct conflict upon the point as to whether the libellants had leave from the first mate to go ashore.

The proof was, that at the time the libellants left the vessel, the master was on shore, but the first and second mates were both on board. The second mate testified that the men asked him for leave to go on shore and get their dinners, and that he gave them leave, ordering them to come immediately back. Evidence was offered to show that the libellants applied to the first mate, and that he expressly forbid their going. Coffin, the first mate, swore that the libellants did not ask his leave to go ashore; that he forbade their going, when they were not more than twenty feet off; and that they heard him. The pilot, who was a witness for the claimants, did not hear any permission or orders given by either of the mates, but himself ordered the

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libellants to remain on board. The deposition of Edmonston, a bystander, on the part of the claimants, asserted that he heard the pilot and chief mate forbid the libellants' going ashore. On his cross-examination, he said that they "requested" the men to remain on board; that they replied to the mate that they would not be gone long, as they were only going for a glass of grog; and that he gave Johnson a sixpence for that purpose. Jones, another witness for the claimants, saw the libellants leave the vessel, did not hear permission given them, but heard one of the mates call out to them and ask them where they were going, and they replied that they would not be gone more than twenty minutes, and ran off.

On the trial at the suit of the United States, Retan, one of the libellants, testified that Johnson asked leave of both the mates; that the libellants all left the vessel publicly in sight of the crew; and that the first mate did not say a word, though he might have spoken to Brown. Johnson testified to the same effect, and also that the second mate told him that if he came back in half an hour it would be in time. Holmes and Kriegman, seamen on board, also testified that the libellants asked and obtained leave of absence from the first mate. Smith, the second mate, also swore that he heard the first mate give Johnson leave to go ashore, and that the other two men accompanied him.

It further appeared, by the evidence of the claimants' witnesses, that the master met the libellants on shore as they were going from the vessel, and asked them where they were going; that they replied, "for a glass of grog;" that he told them to be back immediately, as he was going to sea directly; and that he then went

to the ship and told the mate to get all ready and go out into the stream, and he would go and look for the men. There was much conflict in the testimony as to the length of time the libellants were absent, but the claimants' witnesses stated that the master returned without the men, and put off from the pier in a boat, and that soon afterwards the men came down, and were upon the wharf when the boat returned. The first mate testified that the master gave the boatmen orders to bring off the libellants; that nothing detained the vessel but their absence; and that he, the first mate, was on the look-out for them, and within hailing distance of the wharf, but could not see them. Edmonston, who was upon the pier, swore that the libellants were in fault in not returning. On the other side, the two boatmen swore that they received positive orders from the master not to bring off the libellants, and that one of them jumped into the boat for the purpose of returning, and was ordered out. Some of the crew and passengers swore that the men were seen by all on board, and that the general understanding was, that the vessel was waiting for a cook and a steward, and for some other men. The entry in the log was made on the same day, after the vessel had got under weigh and had left the port.

Washington Q. Morton, for the libellants.

Elijah Paine, for the claimants.

BERRS, J.—The purport of the pleadings between the parties, is, on the part of the libellants, to claim wages for the entire voyage stipulated in the articles, and also

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the value of their wearing apparel carried off in the ship, and not restored to them, on the ground that performance of the contract by them was prevented by the fault of the master; and, on the part of the claimants, to bar both demands, because the libellants had deserted the ship and had thus forfeited their wages and their clothing left on board. The controversy in the cause turns upon this defence; for it is not disputed that the libellants performed their duty during the voyage out, and were left in Liverpool by the departure of the ship.

There is a conflict in the testimony as to the manner in which the libellants were separated from the ship. It is a question to be decided by the evidence, whether the forfeiture demanded can be maintained either upon the general principles of the maritime law, or under the special provisions of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 131.) The allegations in the answer, although not technically adapted to either branch of the defence, are substantially sufficient to put those points in issue, and to authorize a decree for the claimants, if they have sustained the defence by proof, and if the law entitles them to a judgment of forfeiture. The efforts of the defence have been mainly addressed to the point, that the libellants wilfully deserted the ship, and the testimony is to be first applied to that branch of the case.

Desertion is, by the law maritime, an unlawful and wilful abandonment of a vessel, during her voyage, by her crew, without an intention of returning to their duty. It is not a mere unauthorized absence from the ship without leave. (*Molloy*, b. 2, ch. 3, 348, 349; *Abbott on Shipp. ed.* 1829, 134, 135; 3 *Kent's Comm.* 198.)

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The one is an act of deep turpitude and disloyalty, evincing premeditation and criminality of purpose; the other often springs out of the improvidence and thoughtlessness which are incident to the habits and character of sailors. I have examined carefully the evidence produced by the claimants to establish the first charge, and no part of it, in my opinion, fixes upon the libellants an intention to abandon the ship. If the libellants went away from the ship without the permission of the officer in command, their going on shore at the time was disorderly and culpable. But the claimants show by their own proofs, that the libellants left the ship for an innocent object, and returned so soon to the place where they left her, and made such urgent exertions to get on board again as to demonstrate that they had no design to abandon her. This strips their act of the essential ingredient of a desertion under the maritime law. That is a high crime in all maritime codes. (1 *Valin's Comm. sur l'Ord. de la Mar. b. 2, tit. 7, art. 3, p. 534.*) Some of the early laws placed the desertion of a sailor from the merchant service, particularly if accompanied with a larceny, in the same rank with desertion from a ship of war, and subjected the offender to the punishment of death. (*Laws of Wisbuy, art. 61.*) By other laws, he was, for mere desertion, branded or imprisoned as a felon. (*Laws of the Hanse Towns, art. 43, cited in Malynes' Lex Mercatoria, App. 20.*) And, in the more humane usages and legislation of later times, desertion is punished by imprisonment of the deserter or confiscation of his wages and effects, or by both; (*Abbott on Shipp. ed. 1829, p. 134;*) and, in England, the punishment is prescribed by act of Parliament. (*Act 2 Geo.*

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II. ch. 36, §§ 3, 4; Act 31 Geo. III. ch. 39, §§ 3, 4.) In my opinion, the evidence disproves the charge that the libellants were guilty of desertion, as that offence is defined and punished under the maritime law.

If, then, the claimants show legal cause in bar of the action, and for the forfeiture of the demands sued by the libellants, it is under the other branch of the defence—that their absence constituted the offence called “desertion,” in the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 131,) and made punishable as such. Under the maritime law, the Courts exercised a discretion, in punishing malfesances on the part of seamen, in derogation of their duty to the ship and of the authority of the master, but not amounting to wilful desertion, by a subtraction of wages, or by personal fine or imprisonment. (*Laws of Oleron*, art. 20; *Laws of Wisbuy*, art. 17; *Laws of the Hanse Towns*, art. 40.) The British Parliament, to guard against severe punishments disproportioned to the offence, limited, by statute, the kind and degree of punishment which might be inflicted on mariners for leaving a vessel on a coasting voyage or in a home port, without permission of the officer in command. (*Molloy*, b. 2, ch. 3, p. 349; *Act 31 Geo. III. ch. 39.*) The act of Congress adopts, in almost the same words, the description of the offence of absence from the ship without leave of the officers, which is found in the English statute. But, creating a new method of proof, it declares an absence, so proved, to be a “desertion,” carrying with it a forfeiture of the wages and effects of the seaman, and thereby raises what is a minor offence under the maritime law and the English statute to one of high magnitude under our statute, and makes no discrimination between absences at

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home, absences in coasting voyages and absences in foreign voyages. This Court has always regarded our statute as not only determining the punishment which alone can be applied to this offence, but as intended to define "desertion," and to appoint the method by which that crime must be proved, before the serious consequences denounced against seamen can be incurred. It has, accordingly, been held, that every absence of a seaman from his ship, which is set up as a forfeiture of wages, must be proved in the manner directed by the statute, whether the leaving the ship was with the intention to desert or not. This principle is involved in the cases of *The Cadmus*, (*ante*, p. 139,) *The Martha*, (*ante*, p. 151,) *The Elizabeth Frith*, (*ante*, p. 195,) and several others. The doctrine deduced from that view of the law was, that acts of negligence or malfeasance in a crew, in respect to their remaining with the ship, could no longer be visited with a forfeiture of wages and effects, upon the common principles of the maritime law, nor unless the proof was made out in the way prescribed by the statute. As a necessary corollary from that doctrine, it was held to be indispensable to a conviction, to produce every particular of the proofs demanded by the act. It was also held, that the record in the log-book must declare the beginning and continuance of the absence, must be entered the day the seaman left the ship, and must assert that his absence was without the leave of the officer in command. A case decided by the Circuit Court for the First Circuit has since been made public, which gives a different construction to the statute, and holds, in effect, that a new offence has been created and superadded by it to those existing

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under the law maritime, and that seamen remain liable, as before, to a confiscation of their wages, for abandoning their vessel with intent not to return to her, and may be convicted of that offence upon oral evidence alone. (*Cloutman v. Tunison*, 1 Sumn. 373.) This decision is high authority, and might have controlled the opinion of this Court, if known to it at the time of the former adjudications; but I am not so convinced of the justness of the interpretation put by it upon the statute, as to retract the previous views of this Court and adopt that opinion in their place. I think that the case of *Cloutman v. Tunison* overlooks the probable policy which led to this enactment, and gives it an operation especially beneficial to ship-owners and injurious to seamen, without any compensatory privileges to the latter. The proneness of seamen to leave their ship whenever the opportunity presents itself, is as notorious as their characteristic restlessness of disposition and heedlessness of obligation. Their consequent exposure to sacrifice all their earnings by unauthorized absences from their vessel was apparent to Congress. Ship-masters or owners, irritated by suits for wages, were accustomed, after voyages were ended, to oppose the actions, by setting up such absences, on oral proof, as acts of desertion, although they were overlooked and considered of no importance at the time. The rights of the men were thus placed at the discretion of the Courts. Some tribunals, disposed to look with leniency upon their doings, would exact very clear evidence of wilful fault on their part, and of injury to the ship, and would demand clear proof that no disposition had been shown by the seamen to make amends or to return to duty, and would be inclined to impose the mildest punish-

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ment the case would warrant. Other judges, with a sterner eye to subordination, to discipline and to fidelity in the service, would call for a rigid compliance by seamen with every duty, and would, on slender proofs, adjudge the highest penalty of the law for absences of a venial character, even where the seamen had been anxious to return to their duty. For, although the law accorded to a seaman the privilege of repenting of his misconduct, and of being reinstated in the ship, on proffering proper amends, yet it left it to the discretion of the Court to say whether repentance had come in due time and had been satisfactorily manifested. The sub-officers of the ship, harassed with actions by the seamen for alleged misuse on their part, or bearing grudges for personal indignities or wrongs received on the voyage, would be willing witnesses, at remote periods afterwards, to furnish evidence of absences or desertions during some period of the voyage. The act of July 20th, 1790, (1 *U. S. Stat. at Large*, 131,) operates to correct the unrestrained discretion of Courts and the loose rules of evidence in relation to this subject; and it is reasonable to suppose that Congress intended, by remedying those evils, to secure some equivalent to seamen for the new advantages conferred on ship-owners by the act, in rendering any casual absence by a seaman from his ship, for over forty-eight hours, without any intention to desert, cause for an absolute and unremittable forfeiture of wages.

Another prominent mischief in the existing law was, the want of a fixed rule, defining the offence of desertion and determining the time within which a seaman might repair his error by returning to the ship, and

the master or owner be compelled to accept his return. It is hardly to be supposed that Congress, in view of the state of the law maritime, as it then existed, and the class of men they were legislating about, passed the act in question with the idea that the public interest demanded that a sailor, who, in a spirit of frolic or heedlessness, dodges his officers and goes ashore for a spree, or gets into one after leaving the ship, and keeps away for more than forty-eight hours, should be subjected to no less a mulct than the absolute forfeiture of his wages and clothing, whilst his comrade, who, clandestinely, with premeditation, or openly, in defiance of the authority of the ship, abandons her, declaring his intention not to return, might come back at the end of a week or more, and, at the discretion of the Court, and against the remonstrances of master and owner, be reinstated in his place, with a full right to his wages. I think it more reasonable to suppose that the statute was intended to reduce to certainty the loose rules respecting the signification and consequences of the crime of desertion, in order that masters, owners and mariners might know by what law they were governed, than to suppose that a legislation so formal, and burthened with such onerous forfeitures against seamen, was considered as called for, or was meant to be applied solely to the commonplace misdemeanor with seamen, of absence from the ship without leave. It is not my purpose to discuss the question as to the true construction of the provisions of the statute. These suggestions are made as an apology for adhering to the interpretation adopted by this Court, until an exposition of the law shall be given by the Supreme Court or by the Circuit Court for this Dis-

strict, which will be conclusive upon this Court. In my judgment, then, the departure of the libellants from the ship, whether alleged against them as a wilful desertion or as an absence without leave, must, in order to subject the libellants to a forfeiture of their wages and property, be established by the evidence and in the manner prescribed by the statute.

The preliminary or documentary proof by the log-book, demanded by the statute, is sufficiently made out in point of form, in respect to two of the libellants—Peter Johnson and Harman Retan. The other libellant, William Brown, is not mentioned in the log. His name is in the articles. William Sands is named in the log, with Johnson and Retan, but the mate does not prove, if such testimony could be competent, that the entry was intended to be "Brown" instead of "Sands." In regard to Brown, therefore, the evidence is vitally defective in this particular, and, accordingly, no forfeiture of wages and clothes, under the provisions of the act of Congress, can be set up as to him.

I think, also, that there is a cardinal defect in the claimants' evidence in respect to the other libellants. The ship went to sea within two or three hours after the men had left her, and of course they could not have returned to her within forty-eight hours. It may, perhaps, be open to debate, whether, in case of a faulty absence, the seaman is not to take the risk or peril of being able to get back to the ship within the time limited. Whether this would be so in the case of a disability solely personal to the seaman, need not now be considered. For, in the present case, the preventive cause existed in the ship and in her officers alone. The

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statute grants to seamen who improperly leave their ship, a *locus penitentie* of forty-eight hours. Until the completion of that term, no cause of forfeiture comes into existence. This would be the reasonable interpretation, if the penalty had been declared for the mere act of absence for so many hours. But the language of the statute makes it plain, that it intended the seaman should have the benefit of every hour out of the forty-eight, to return to the ship, and that no forfeiture arises unless that time has been allowed him. The enactment is: "If such seaman shall return to his duty within forty-eight hours, he shall forfeit three days' pay for every day he shall so absent himself, to be deducted out of his wages; but, if he shall absent himself for more than forty-eight hours, at any one time, he shall forfeit all the wages due him," &c.—that is, he is subject to a fine of six days' pay, and no other punishment, if his absence continues the whole forty-eight hours. The forfeiture does not begin to attach before forty-eight hours of absence have expired, within all which time the seaman must have neglected to return to his duty. This necessarily imports that the ability to return was not withheld from him for that time. But if within three hours the vessel went to sea, and put it out of the power of the libellants to return to their duty, it seems to me that the owners cannot be permitted to make the volition and act of the master change the fine of six days' pay, appointed by the statute for an absence of two days, into an instant forfeiture of wages for perhaps as many months, or for a year, already earned. Had the ship been destroyed by fire in the harbor, or been sunken there before the forty-eight hours ran out, could a forfeiture be exacted

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of these men? Yet, in respect to their right to elect to return within the time limited, it is the same whether the ship was physically destroyed, or was removed out of the way, so as to render it impracticable for them to join her. If the claimants demand a forfeiture under this act, they must show the commission of the offence within the terms of the law. In respect to the punishment now sought to be inflicted under this statute, the case stands as if the law had granted an absolute furlough or leave of absence to the libellants, at Liverpool, for forty-eight hours, independently of the consent of the master or officers, and without the limitation or condition that the vessel should remain so long in that place. Clearly, the master could not, at his own volition, by removing the ship and thus preventing the return of the libellants at the end of the furlough, convert that privilege into an offence which should carry with it the confiscation of the wages and wearing apparel of the men. The act provides, in effect, for a statutory furlough or leave of absence, with the limitation that the seaman may, at the option of the master, be compelled to pay three days' wages for each day's privilege of absence. In the present case, the privilege was defeated by getting the ship off, without the assent or knowledge of the seamen, before the expiration of the time allowed them to redeem the forfeiture, if a technical one had been incurred, and thus a punishment not authorized by Congress is imposed upon them.

The argument that the libellants went on shore in their own wrong, knowing the ship was to go to sea immediately, and thus by their misconduct caused a delay of the voyage and other injuries, does not obviate the

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objection to the forfeiture now demanded. That act of irregularity may bring them within the penalties of the law maritime, but it is not the offence made punishable by forfeiture of wages under the act of Congress; and no punishment greater than that which is directed by the statute, can be inflicted because of the wrong motives of the men. The statute does not make the intent or purpose with which the forbidden act is done, a constituent of the offence; but, assuming that the crew leave the vessel wrongfully, it allows them the full period of forty-eight hours within which to avoid the forfeiture.

I am satisfied, therefore, that the statutory judgment of forfeiture is not incurred in this case, because the means of returning to their duty on board were withheld from the libellants by the act of the master. It does not follow that a dereliction of duty will pass unpunished because an entire forfeiture of wages and effects is not imposed. The compensation which the owners may demand and obtain may be equal to or beyond the amount of the wages. But it is important, in respect to the powers of the Court and even the principle upon which punishment is to be decreed, to ascertain the operation and meaning of the statute. For, though the injury be ever so trivial and the amount of wages due be ever so great, yet, when the case is brought within the statute, the Court can pronounce no other judgment than one of forfeiture; whereas, if the case be one of misconduct, in violation either of the shipping articles or of the duty of the mariners under the maritime law, the Court can apportion the compensation according to the nature and consequences of the offence and of the injury.

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The remaining inquiry relates to the truth of the entry in the log; that is, whether the defence that the libellants were absent from the ship without leave, is supported. It is proved that the libellants had leave from the second mate to go on shore for their dinner; and, if they went upon that authorization alone, I think their case is taken out of the interdiction of the statute of "absenting themselves from the ship without leave of the master or officer commanding on board." The master was on shore at the time, and the first and second mates were on board. Of course, the permission of the master need not be shown. In the merchant service, the master, when present, and after him the mates, pursuant to their grades, are to be regarded as "commanding on board," according to the order and discipline of the service. There can be no doubt that the authority of those officers, when exercised by them according to their grades, must be obeyed by the crew. Still, it will rarely be the fact that the master, even when on board, actually exercises the command in all particulars at any time, or that the orders of the mates are not to be observed, whether they emanate directly from the master or are unknown to him. The phraseology of the statute is not to be understood as having relation to the ultimate authority on board. Each officer is "commanding on board" in his particular department, although all are present. No vessel could be navigated if this were not so; and, as a sailor could never refuse obedience to an order of a mate, in the proper business of the ship, on the ground that it did not come from or was not known to the master, so, in relation to relief from duty, he would be well justified in acting under the authorization of a

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mate merely, if the order was not superseded by a superior officer. It must necessarily be that the mates will have the principal charge of the employment and relief of the men; and, as either of the mates may set them to work when the business of the ship requires it, so, also, each is impliedly clothed with sufficient authority to grant them an excuse from work or the indulgence of absence. Seamen are not bound to know the manner in which commands are distributed amongst the officers on board, unless they are specifically notified. As each officer is entitled to their full obedience, so, also, are they well justified in looking to each as competent to accord them privileges and indulgences in respect to their duties. Unless, therefore, there is a standing order to the contrary, or the individual is, in the particular case, otherwise directed, a sailor who obtains permission from any officer to go ashore, cannot be proceeded against as absent without leave, within the purview of the statute. Regarding it as implied upon the proofs, that no order had been given to the crew of this vessel that they should ask leave of absence only from the first officer on board at the time, I think the permission of the second mate was a sufficient justification to the libellants. He was "commanding on board," in so far as to be authorized to give them the temporary leave of absence they requested.

Evidence, however, is offered to show that the first mate expressly forbid the libellants to leave the ship. If a conflict of orders between the officers occurs on board, no doubt the seamen are bound to obey the one highest in command; and the chief mate, as an ordinary rule, would have authority to revoke any permission to

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go ashore given to the men by the second mate. It is alleged that such revocation was made in this case, in two ways—first, in refusing leave to the men, when they afterwards applied to the first mate; and secondly, in ordering them back to the ship after they had got on shore. There is no witness but the chief mate who proves a direct refusal of leave. The pilot, who was standing by, does not confirm him; and several other witnesses, examined by the libellants, heard no such command. The evidence of Edmonston, when taken together, rather imports the consent of the chief mate, as the refusal first testified to is softened down to a request to the men to remain on board, accompanied by a donation of sixpence, asked by one of the men for the purpose of getting grog on shore. The proof may be equivocal as to whether the sixpence was given by the chief mate or by the witness; but if by the latter, as it was at the moment the men were saying to the mate they were only going for grog, and, as they thereupon went off, without anything further being said by him, his acquiescence may be fairly implied. The same inference would arise from the testimony of Jones. The evidence on the part of the libellants, giving it the least possible weight, puts the matter so far in doubt, that the Court cannot satisfactorily say, upon the proofs, that the libellants went ashore without the leave of the first mate. As the two mates swear in direct contradiction upon this point, that conflict, if there was nothing in the proofs demanding credit for the one above the other, would place the cause in a situation where a judgment of forfeiture could not be properly awarded. But I think the collateral evidence is corroborative of the second

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mate's account, and adverse to that of the first mate. There is evidently a coloring in the first mate's testimony, hostile to the libellants. He asserts that the master told the boatmen to bring off the libellants in particular, while both boatmen swear that the orders were directly the contrary. He also says, that nothing detained the vessel but waiting for the libellants, and that he was on the look-out for them, but saw nothing of them on the pier after the vessel cast off, though she came up within hailing distance. It is very clear that it was well understood on board that the men were on the pier, and that they were seen by the master and the pilot, and were also pointed out by one of the mates to a passenger, who, though near-sighted, saw one of them. It is scarcely credible, therefore, that the first mate could be on the look-out for them, and yet be ignorant of what was so generally known on board. There is, also, upon the proofs, the strongest reason to believe that the vessel was not lying to solely for these men; and it is difficult to suppose that the first officer thought that that was the reason of the delay.

If, then, the case stood solely upon these proofs, I should be of opinion that no ground for a forfeiture of wages had been established against these libellants. But the evidence by the claimants' witnesses, as to the master's meeting the libellants on shore as they were going from the vessel, is equally fatal to the defence. What then occurred between the master and the libellants was a direct assent by the master to their going. The same testimony is also cogent to show, that there was then no suggestion made by the mate that the men had deserted or gone off without permission, and

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that he must have well known of the master's acquiescence in their absence. In either aspect of the case, the entry in the log, that the libellants were absent from the ship without leave, was not warranted by the facts, and the allegation of their desertion and forfeiture of wages is clearly rebutted.

The remaining consideration is, whether the libellants, by such departure from the ship, were guilty of misconduct injurious to the owners, entitling the latter to claim a compensation for damages or a subtraction of wages. If the proofs were satisfactory, that the men left the vessel in disobedience of the orders of the first mate, or even privately, without permission of any officer, I should regard such conduct as rightly depriving them of all claim to wages subsequent to that time, and also as rendering them responsible, out of their anterior wages or their effects, for the damages occasioned by their absence, notwithstanding the statutory proofs are of no avail against them, it being competent for the Court, under the maritime law, to recompense the ship for wrongs done by the crew, either by imposing a fine or a subtraction of their wages. (*Cons. del Mare*, ch. 169; *Laws of Oleron*, art. 5; *Laws of Wisbuy*, art. 17.) But it seems to me that the preponderance of evidence is clear, that the libellants had the sanction of the proper officers to their going ashore, or that, even if the first mate did refuse them leave, which I do not consider as proved, his order was superseded by the subsequent assent of the master to their being on shore.

There is, as would naturally happen, a wide difference between the witnesses, in their estimate of the time the libellants were absent. Had their stay been un-

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reasonably protracted, that would of itself be ground for damages or compensation to the owners. But I think that the witnesses for the claimants state facts which show that the libellants' return followed closely upon that of the master. All the detention the vessel need have incurred, if she was waiting for the libellants alone, would have been to allow time for the boat to make a trip from the vessel to the shore and back, a distance not exceeding a mile in the whole, and one easily rowed in a few minutes. It is certain that the libellants made efforts to reach the vessel in that manner, the moment the boat touched the pier. The statement of the boatmen in respect to the master's orders is more likely to be accurate than that of the mate or that of a casual bystander like Edmonston. Indeed, the evidence very strongly imports that the master intended to desert the men, with a view probably to save the expense of their wages home. If that was not his purpose, his conduct evinced, at least, that he meant to put himself upon the strictest point of right, and to leave the libellants to get back to their duty at their peril. If, ordinarily, he might have had a right so to do, it was not allowable in this case, he having sent to the libellants a message signifying unmistakably that he did not mean to permit their return. After they learned from the boatmen the master's orders, they were excused from any further exertions to join the vessel. The master placed himself in the wrong, and, both by his orders and his conduct, prevented the libellants from performing their voyage, which they were ready and anxious to do. They are, therefore, entitled to full wages for the voyage out and back, and also to an indemnity for the value of their property

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left on board. A decree will be entered in conformity to this decision, with a reference to the clerk to ascertain the amounts due.

Decree accordingly, with costs.

QUASELLE SUNDAY

vs.

JOSEPH GORDON, JACOB D. FOWLER and CHARLES
SHILLETOR.

The owners of a vessel are not liable for personal torts committed by a master without their knowledge or approval.

Passengers and seamen who are carried to a port different from the one agreed upon, may maintain an action in Admiralty for damages.

Slight credit will be given to the unsupported evidence of a witness who testifies to admissions obtained by him from a party for the purpose of charging him thereby.

Persons who are not strictly mariners may charge a vessel or her owners, in Admiralty, for services on ship-board which are necessary to her navigation or safety.

But, where a master who contracts a sickness in a foreign port employs a native as a man servant or attendant only, those services are not to charge upon the vessel or her owners.

Evidence of a usage to receive such natives temporarily on board of a vessel, and to leave them at convenient ports in the course of the voyage, paying them for their services at the discretion of the master, is admissible to determine the extent of the liability of the owner of a vessel, when sued for wages by such a native employed on board the vessel.

A person who, from incapacity of mind or other cause, cannot be made to understand the English language, cannot be a party to a sworn libel. He should sue under the guardianship of a committee, a *prochein ami*, or a trustee.

February 8th, 1837.

THIS was an action to recover seaman's wages and damages. The libel alleged that the libellant shipped at Elmina, on the coast of Africa, as a seaman on

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board the brig Packet, of which the respondents were owners, to perform a voyage to the port of Liberia, also in Africa, at twelve dollars per month; that it was agreed he should be set ashore at the latter place; but that the master of the vessel, in violation of his contract, did not set the libellant on shore at Liberia, but brought him, against his will, to New-York. For this tort the libellant claimed damages. The libel further alleged, that the libellant performed duty on board during the voyage, which lasted between two and three months; that, on arriving in New-York, he assisted in discharging the cargo and relading the vessel for a voyage out again; that the libellant was assured by the master and owners that the brig was loading for a voyage back to Elmina, and that he should be returned to the port of his residence and nativity; and that, in April or May, 1835, the vessel sailed, as the libellant was assured and supposed, for Elmina, but in truth for Mogadore, in Morocco, and came thence back to New-York, without going to Elmina or within a thousand miles thereof, and without sending the libellant home or permitting him to leave the brig. The libellant averred that he would not have gone on said voyage but for the assurance and under the expectation that he was to be carried directly to his place of residence, and he charged this as a fraud upon him by the master and owners. The libel further alleged, that the brig arrived in New-York in the month of November, 1835; that the libellant did duty during the whole voyage, being between six and seven months; that he served on board, including both voyages, eleven months in all; that he signed no shipping articles; that the highest wages at the port of New-York, within the

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three months next preceding the last voyage, were sixteen dollars per month; and that he had received no wages except twelve dollars paid him at Elmina. The libel alleged, also, that the libellant was a native of Africa, and understood the English language but imperfectly, and that, after he was discharged, one of the respondents took him to his house in the city of New-York, and compelled him to begin a course of servitude in his family. To the libel were annexed eleven interrogatories, which the respondents were required to answer under oath.

The respondents, in their answer, denied that the libellant shipped at Elmina as a seaman, and that he did duty as a seaman on board the brig, and that he was capable of doing seaman's duty, and that the master had paid him twelve dollars within their knowledge. They admitted that the brig arrived at New-York, after a passage of three months and one day, and that the libellant remained on board during the discharge of her cargo, and until she was reladen for another voyage, and asserted that the master of the vessel died at the Quarantine, one hour after the vessel arrived there. They denied that the libellant assisted in lading or unlading the vessel, and that he did any duty on board, and that, after the death of the master, the new master or the owners assured the libellant that the brig was loading for a voyage back to Elmina, or that he should return direct to that port. They did not admit that any assurances had ever been given to the libellant that he should return to Elmina from New-York as soon as the brig could make the voyage, or that the libellant was a native of Africa, or that the respondents gave the libellant any assurances that the

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brig was going direct to Elmina on her second voyage, or that they ever offered to send the libellant home, or refused to allow him to leave the brig, or practised any fraud upon him; and they further denied that any such assurances were given to the libellant, to the best of their knowledge. They alleged that the brig was bound to Mogadore, and returned to New-York in November, 1835; and they denied that the libellant continued on board eleven months and did duty as a seaman, and that the master, or any other person connected with the brig, had put the libellant to servitude, and that the libellant was anxious to return to Africa. On the contrary, they alleged that he refused to return on two several occasions when passages had been procured for him, and that he was indebted to them in the sum of one hundred and fifty dollars for money advanced. They also denied that they owed the libellant one hundred dollars, or any other sum, and that Shilletoe, one of the respondents, was ever a part owner of the vessel, and they set forth the names of her present owners.

The evidence offered by the libellant, to prove his employment upon the brig, consisted of conversations in this city between a colored man, who offered to act as his friend, and Shilletoe, one of the respondents, in which the services and claims of the libellant were admitted. It was proved by the other respondents that Shilletoe was not a part owner of the vessel, and had no power to bind, by his declarations, the other respondents in their character of owners. The remaining evidence is sufficiently stated in the opinion of the Court.

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Alanson Nash and *Erastus C. Benedict*, for the libellant.

John A. Morrill, for the respondents.

BETTS, J.—The answer of the respondents seems to be drawn with reference to the special interrogatories annexed to the libel, rather than to the charges of the libel itself, and therefore does not furnish very direct or distinct issues to the allegations of the libel. In fact, the answer is so framed as to amount to a negative pregnant upon nearly every averment incorporated in it. The pleader who drew it has attempted to intermingle the *formulæ* of answers in Chancery with a very abrupt and literal mode of negation to the allegations of the libel. Upon the interposing of a proper exception, the Court would have ordered the entire answer to be withdrawn, and a plain, succinct, but full reply to be given to the positions of the libel. The libellant having, however, treated the answer as sufficient, and brought the cause to trial upon proofs, it becomes necessary to gather from the pleadings the points that are at issue in such a way as to admit of evidence being given in regard to them, and then to ascertain what testimony, if any, comes properly within the compass of such issues. The pleadings may probably admit the construction that the *gravamen* of the libellant's action is denied. At all events, no fact supposed to supply a right of action is admitted by the answer, and, in the condition of the cause before the Court, the libellant will accordingly be no less required to support his case by proofs, than he would have been had a plain and unequivocal denial been interposed.

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The libel seems framed with the intent to exhibit four distinct causes of action—two resting in contract, and two in fraud, deceit and unlawful violence. The contracts asserted by it, are a hiring of the libellant as a mariner, at Elmina, in Africa, to proceed to Liberia, at twelve dollars per month, and a hiring in New-York, at least by implication, to serve as a seaman on a voyage back to Elmina. The matters of fraud and deceit or force, are the surreptitiously bringing the libellant off from Africa, and afterward carrying him out to Mogadore, and thence back to New-York. If the libellant was tortiously brought off from Africa, that was exclusively the act of the deceased master. There is no evidence that he was authorized to obtain, by hiring, force or stratagem, negroes on the coast, for the purpose of bringing them to this country, or that the owners afterwards approved the act; and the owners, accordingly, would not be chargeable for any act of trespass, false imprisonment or kidnapping perpetrated by the master. The tortious acts charged upon the owners, and assumed by the libellant's counsel to have been proved, consist in shipping the libellant under a representation that he should go to Elmina, when in fact it was intended the vessel should go to Mogadore only, and in transporting him, against his will, to this country, and compelling his services on the voyage. I think a seaman might sustain an action in this Court for a wrong of that character, and be compensated in damages adequate to the nature of the injury. In the matter of contract, the mariner is at all times entitled to an undisguised disclosure of the voyage he is to perform; and it would be an outrage meriting the vigorous interposition of the tribunals, if

a foreigner, shipped under the assurance of being taken on a coasting voyage from place to place, and of then being discharged at his home port, should be compelled to perform an entirely different voyage, and one terminating at the home port of the ship, in a place not contemplated in the contract or known to the mariner. And, if the libellant was to be regarded merely as a passenger, he would be entitled to a strict performance of the contract for his transportation, and to have redress against the ship-owners in this Court for a violation of it. Certainly, a ship-master cannot be justified in taking passengers, on an engagement to carry them to a specified place, and in afterwards, at his own election, changing his ship's destination, and carrying them on such voyages as he or the owners may choose to make, and finally landing them in a remote and to them unknown country. Passengers can maintain their actions and obtain redress in Courts of Admiralty for such violations of contracts with them. But the testimony entirely fails in establishing either a contract of hiring, as set up by the libel, or an agreement to carry the libellant as a passenger.

If the respondent Shilletoe was correctly understood by the witness who says he has admitted he was part owner of the ship, there is no proof showing that he had, in fact, any interest in her, and his declaration could, accordingly, avail no further than to charge him individually, if such statement, in the absence of all other evidence of ownership, would render him liable in that character. The answer denies that he was owner at any time, and such is the proof on the part of the other respondents; and, admitting that Shilletoe asserted that he was a part owner, his

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declarations alone would not be competent evidence to charge the other respondents. The respondent Gordon, in conversation with the same witness, declared that the owners were in no way responsible to the libellant, and that the master had acted without authority, and wholly contrary to their wishes, in bringing a native African from his own country to the United States. Very little reliance can be safely placed upon the version of conversations given by a witness who was seeking through them the means of maintaining an action in favor of his employer. However honest and commendable his motives might have been, a witness so employed would be exceedingly apt to remember statements favoring the wishes of his employer, and to forget or not listen to explanations and qualifications made at the time. That this has been so in the present case, to a very considerable degree, is obvious from the testimony of another witness on the same subject. On a careful examination of the proofs, it appears to me they establish no more than this state of facts—that it is customary, on the coast of Africa, for trading vessels to employ natives, at about twenty-five cents per day, as laborers, in loading and unloading foreign vessels in harbor and doing other work on board of them; that these laborers frequently accompany such vessels from port to port along the coast, and often come out to the United States and return with them; that, in the latter cases, they are compensated by a “clash,” as it is called, being some trifling articles for trade, and also personal clothing; that the natives regard it as a great object to come off in that way and learn the English language, as it gives them consequence at home and enables them to get good employment on vessels trading on the

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coast; that they are no sailors, and are never put to duty as seamen; that, in this particular case, the libellant came off with the expectation of being left at Liberia, but the master, being sick with the fever common to that coast, retained him as a nurse or waiter to attend upon him, and brought him to the United States; that he understood nothing of a ship's duty, and was never, whilst attached to the brig, put to any other employment than that of sweeping decks and occasionally working at the pump, and then chiefly for his necessary exercise; that his services were never of any value to the vessel; that, when the brig went back from this port, with the libellant on board, she was on a trading voyage, and it was within her instructions to run down the coast of Africa, if a good market should not be earlier found, and there land the libellant where he could most readily reach home; that, after the cargo was disposed of at Mogadore, no vessel was there by which the libellant could be sent down the coast; that the master refused to leave him, because, by the laws of Morocco, he would have become a slave; that he was accordingly brought in the ship to the United States; and that the respondents clothed and maintained him here, and procured a passage for him back to Liberia on two occasions, but that once he refused to go, and on the other occasion he was out of health, and probably so much so as to excuse his accepting the offer. The Court can discern, in these facts, nothing that affords the libellant ground for maintaining this action. It is very clear that he was not employed on board as a mariner; and, although a person filling another capacity may charge the ship or her owners for his services, yet, if he is employed by the master, and not for the owners, it must

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appear that he performed services necessary for the ship or for the business in which she was engaged. Waiters and chamber-maids on board a packet-vessel might undoubtedly compel the owner of that vessel to pay the wages agreed by the master; but, if such persons were retained for the individual comfort or necessity of the master alone, no liability could be imposed on the owner for their services. It might, in this instance, have been a prudent and necessary thing for the master to employ a native servant to wait upon him, in a sickness contracted in that climate; but, whether he be a mere servant, or a nurse or a physician, the services are for the master individually, and have not such relation to the ship or crew as to render the owners responsible for them. The evidence, certainly, is very faint, as to the occasion or manner of the libellant's being employed; and, if it is helped out at all by implication, the custom of the coast would probably furnish the key of interpretation which the Court would be bound to accept; and, in that view, the libellant must be regarded as having gone on board the vessel on the well understood terms of enjoying an opportunity to acquire the English language, and of receiving such gratuity as the master might see fit to bestow. There is certainly nothing to justify the Court in inferring that he did not leave Liberia, where the vessel touched, with the same readiness that he left Elmina. It is shown to be the ordinary usage to carry natives from Elmina to the Cape, to the Gulf of Benin and to Liberia, and to land them, and then for other vessels to take them back; and, if the libellant went voluntarily to Liberia, there is nothing laid before the Court to raise a presumption that he had not a free opportunity

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to leave the vessel at that port, or that he came with her from that place upon any other terms than were customarily allowed in similar cases. In either of these points of view, the action cannot be sustained—first, because the libellant's services were not rendered to the vessel, but to the master individually, and therefore the owners are not chargeable for them; and secondly, if they are to be regarded as services rendered to the vessel, they were to be compensated in conformity to the usage of the coast, chiefly by affording to the libellant the means of learning the English language, and then by giving him a small gratuity at the discretion of the master. The Court perceives, in arrangements of this character with native Africans, much to disapprove. If they occur frequently, they will lead to abuses that may well awaken serious apprehensions here as to the ultimate interests and welfare of these benighted beings, and as to the purposes of ship-masters in bringing them off. But, looking at the case as one between party and party, I am not prepared to say, that such arrangements are to be utterly disregarded, and that the Court shall take the interests of the prosecutor in charge and now see such rights measured out to him as might, by a prudent or intelligent man, have been insisted on and secured before the transaction was engaged in. In contemplation of law, this libellant was competent to enter into such contract of service, and to bind himself to its performance. He must be regarded as thus competent, as much so as any foreigner, and as no more under the guardianship and protection of this Court. Whether, then, the engagement was advantageous or onerous to him, will not be inquired into here, unless for the pur-

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pose of seeing whether the evidence shows him to have been incapable of entering into a contract, or that some imposition was practised upon him.

The Court does not hesitate to express its disapprobation of arrangements of this description with individuals in an uncivilized and savage condition of life, and particularly with Africans upon the slave coast, both because of the lively sensitiveness pervading the public mind in respect to that population, and because of the hazard that our laws and national character may be compromised, by unscrupulous men, in those remote regions, and in transactions with a class of beings easy to be decoyed, and who ordinarily would possess no means, if brought to this country, much less if landed in South America or the West Indies, of vindicating their rights. Yet, the ability of free negroes to surrender up their time and give their services for what to them may appear an adequate consideration, however trivial such compensation may be intrinsically, is not to be questioned in the abstract. It must also be recollected, that the valuation of their services is not to be adjusted or measured by our standard, but by theirs. The palm oil, gold dust or ivory that might be gladly exchanged on that coast by vagrant savages for baubles or strips of calico of light value, would doubtless be adequate to pay the wages of an able seaman in our service; and, until a metallic currency shall be known there, which may afford a common measure of value, fabrics for use or mere trinkets may, in barter, command exchanges vastly out of proportion to the estimate they would receive in marts of trade having a specie medium of valuation, and there is nothing in principle inhibiting that exchange to be of services as well of the products

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of the country. The inexperienced and crude estimates of value by the natives of those regions may as well be the basis of contracts for service, as of contracts for the barter of commodities; and, as to the competency of such persons to bind themselves by contracts for voyages, this Court cannot discriminate between them and Malays or Chinese. If, then, the libellant were to be regarded as having engaged, in the capacity of a mariner, to perform a voyage, I should, upon the proofs, hold that no money wages were to be paid him, and that he had received all the compensation which his engagement contemplated. I am, however, clearly of opinion, that there was no hiring of him as a mariner or for the service of the vessel, but that he was employed on the part of the master solely, for his individual comfort or necessity, and that the owners are not chargeable upon his engagements. The testimony is very explicit to show, that when the libellant went out to Mogadore, it was in no respect in the character of a seaman. Captain Huggett's evidence puts it beyond doubt, that the libellant was regarded merely as a passenger, to be returned gratuitously in that way to his native country. There was no agreement of the master to send him home, except upon the chance of the vessel's going to Elmina. It was a contingency in contemplation, but the voyage was a trading one, liable, from its nature, to terminate long before reaching that place. It did terminate, in the course of its ordinary prosecution, two or three thousand miles from Elmina. The return of the libellant with the vessel to the home port was, accordingly, necessary to his preservation from a state of slavery, to which he would have been subjected if he had been left at Mogadore.

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So far as the proofs disclose, the motives of the respondents, their treatment of the libellant in this country, and the measures taken by them to procure his return to Africa, were dictated by sentiments of liberal and commendable kindness. He was brought to this country without their assent or knowledge, but in a vessel owned by some of them, and through the agency of their master. Death had since put it out of his power to fulfil towards this man the purposes upon which he was brought across the ocean; and the respondents seem throughout to have acted with a marked anxiety to execute in full all that the master had contemplated. They twice procured for him a free passage home in vessels belonging to others. They disbursed for his support and clothing here from fifty to eighty dollars, and, at the last, offered to contribute an additional ten dollars towards getting him off, if his friends could obtain a passage for him in a colonization vessel. It has been thought better to resort to a suit as a means of compelling the respondents to do more. But I am constrained to say, that no action could well be brought more bald of legal or equitable support. The occasion seems further to require, that I should observe, that suits of this character ought never to be instituted in the name of the party, without the direct authorization of the Court. This ignorant savage, who cannot communicate at all in our language, is made to attest, under oath, to a series of allegations and statements, which, so far as his consciousness is concerned, he is scarcely more capable of making than any other individual of his tribe remaining in Africa. According to the testimony of some of the witnesses who know him best, he can hardly be made to comprehend the

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simplest facts occurring before his senses. How, then, is he advisedly to frame a deposition which, under the sanction of an oath, shall enlighten the Court as to his rights? No such person should appear but under the guardianship of a committee, a *prochein ami*, or a trustee, that the Court may see that its process is employed by some intelligent and responsible party.

I shall decree that the libel be dismissed, and with costs, as a necessary consequence, although the latter part of the order must, of course, be inefficacious and nugatory..

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1. Where money is paid by the owner of property to the purchaser of it under an unauthorized sale to satisfy a claim against it for salvage, if it is paid for the purpose of recovering possession of the property, and with an express reservation of all rights, the owner is not prevented from maintaining an action against the salvor founded upon the wrongful sale. *American Ins. Co. v. Johnson*, 9
2. The salvor in such case, if he has not been guilty of an intentional tort, is liable only to the extent of the salvage received by him. *id.*
3. In an action to recover advances made upon a bottomry bond, it is necessary for the libellant to exhibit an account of particulars and establish the necessity of the advances. *The William and Emmeline*, 66
4. Whether the same rule holds in an action founded on a simple hypothecation, without maritime interest, *quere.* *id.*
5. By the act of Congress of July 20th, 1790, § 6, (1 *U. S. Stat. at Large*,
- 183,) a seaman is restricted from bringing an action for wages against a vessel, in her port of delivery, until ten days after her cargo is discharged, unless she is about to proceed to sea before the expiration of the ten days. *The Cypress*, 83
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7. A material man cannot maintain an action *in personam* in Admiralty, where a note or other obligation has been taken for the demand. *The Hilarity*, 90
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- Admiralty will lie for that object,
quere. *id.*
13. A libel brought before the right of action is perfected, must be dismissed, if duly excepted to on that ground, though such right becomes perfected during the progress of the suit. *The Mariha*, 151
14. Where a seaman, a native and subject of Hayti, had shipped in that country for a voyage "to New-York," and the master had given security to return him to St. Domingo, the port at which he shipped: *Held*, that he could not sue in New-York for his wages, no special cause being shown for his suing or for his leaving the vessel, the vessel being about to return to St. Domingo, and the master offering him a passage. *The Pacific*, 187
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18. A hand on board a sloop of over fifty tons burthen plying on the Hudson River, between New-York and Catskill, is a seaman; and an action *in personam* brought by him against the master and owner of the sloop, to recover his wages, is within the jurisdiction of this Court. *Martin v. Acker*, 279
19. The respondent in such action is bound by his acquiescence in an account stated. *id.*
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21. So, if she return to the same port of delivery, a seaman may institute an action at once for wages earned on the previous voyage, though the vessel be not discharged of her second cargo. *id.*
22. Although, in an action *in rem* for wages, a warrant is issued under a certificate of sufficient cause of complaint for Admiralty process, conformably to the statute, (*Act of July 20th, 1790, § 6, 1 U. S. Stat. at Large, 133.*) yet the owner of the vessel may intervene by answer, and bar the action by proving that the libellant had no right to sue. *The Warrington*, 335
23. A seaman who hires for a trading voyage for a specified time, cannot sue for wages until the expiration of the time, unless there be proof of his actual or constructive release. *id.*
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- ent are filed, and the answer, when filed, admits a right of action in the libellant, the Court need not dismiss the libel; yet, if the suit is vindictive or unreasonably prosecuted, costs may be imposed on the libellant. *Granon v. Hartshorne*, 454
29. In actions for personal torts, Courts of Admiralty afford to seamen no remedies and no privileges to which they would not be entitled in Courts of common law. *Peterson v. Watson*, 487
30. Courts of Admiralty do not encourage suits *in personam*, for personal torts committed upon tide-waters within the ports and harbors of a State. *Thomas v. Gray*, 493
31. *Aliter*, when a tort committed upon tide-waters gives a right of action *in rem*, or when a tort is not the sole cause of action, but is connected with other matters which are within Admiralty cognizance. *id*
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35. A suit *in rem* imports, *ex vi termini*, that a particular thing is chargeable with the demand and is subject to arrest therefor. *Reed v. Hussey*, 525
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4. Where a libel claims extra wages, in satisfaction of a short allowance of provisions, under the 9th section of the act of July 20th, 1790, (1 *U. S. Stat. at Large*, 135,) the answer must set forth precisely whether the vessel shipped the quantity and quality of provisions required by the statute, or an exception will lie for insufficiency. *id.*

5. Where, in an action against two parties, for a joint tort, the respondents put in separate answers, each respondent must rely for his defence upon his own answer and the proofs, without reference to the answer of the other respondent; but, unless the answers are excepted to by the libellant, for insufficiency or uncertainty, they will be liberally construed. *Gardner v. Bibbins*, 356

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2. Where, in a suit in Admiralty, property in the hands of a third person is arrested, on a claim to a specific lien upon it, that constitutes the suit *a suit in rem*; and it is not a foreign attachment, whether the third person holds the property as owner of it in his own right, or as trustee of the debtor. *id.*

3. A foreign attachment supposes that the property proceeded against belongs to the debtor, and not to the garnishee, and seeks to make the garnishee the debtor of the libellant, to the value of the property, in case the primary debtor does not appear in the cause or satisfy the decree. *id.*

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1. A master cannot justify an assault and battery on a seaman with a dangerous weapon, by showing that the weapon was casually in his hand, and was used by him in a moment of excitement, under circumstances which would have justified some punishment of the seaman. *Saunders v. Buckup*, 264

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2. Where a vessel injured by a collision is abandoned by her crew and afterwards lost, it is enough, in an action for her value, to prove that her condition at the time appeared to be desperate, even if it be proved that she might have been saved had her crew remained with her. *id.*
3. The measure of damages in such a case is the full value of the vessel and of her freight. *id.*
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5. Where a libellant joined, in an action in *personam*, a claim for wages with one for damages for an assault and battery, and recovered his wages but failed to prove the tort, and the respondent used his evidence regarding the assault and battery to resist the claim for wages: *Held*, that the respondent should recover no costs, and that the libellant should recover costs, deducting the costs of taking his evidence to prove the assault and battery. *Borden v. Hiern*, 293
6. An offer by a ship-owner, after wages to a seaman are due, and after a demand for them is made, but before suit is brought, to pay them at his counting-house, with a refusal to pay elsewhere, does not exonerate him from costs. *The Sarah Jane*, 401
7. A settlement, after suit brought, with a seaman, whose name is continued afterwards as a party to the record, does not necessarily bar his proctor of his claim for costs. *id.*
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9. When the proctor for the seaman intends, after such a settlement, to continue the suit to recover costs, distinct notice should be given to the party sought to be charged. *id.*
10. In a libel for collision, where there was strong probable cause of action, but the libel is dismissed, costs will not necessarily be imposed on the libellant. *The Eliza and Abby*, 435
11. In a suit brought by a seaman for wages, a Court of Admiralty will not allow an out-door settlement without the concurrence or knowledge of the libellant's proctor, to bar his claim for costs. *The Victory*, 443
12. The action may be pursued after such settlement, for the purpose of determining the right to costs; and the Court will, to that end, inquire into the fairness of the settlement with the seaman. *id.*
13. Costs unnecessarily created by side issues on that investigation, will be decreed against the libellant, and may be set off against those allowed him upon the main issue. *id.*
14. Where, in a suit *in rem* for wages, an answer to the libel on the merits was filed, and issue was joined, and afterwards a supplemental answer was filed, alleging a settlement, to which the libellant replied, alleging fraud in the settlement, and noticed the cause for hearing upon that issue, and it appeared that there was a good cause of action for more than the amount paid on the settlement, the costs upon the main issue were decreed to the libellant, and the claimant was allowed to set off the costs created by the new issue. *id.*
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17. The 6th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 134,) which provides that all the seamen having cause of complaint of the like kind against the same ship or vessel shall be joined as complainants, if not impera-

tive upon all the seamen to join in a prosecution already begun by a shipmate for the wages of a common voyage, at least removes all occasion for separate actions, and all equity to costs, where such separate actions are instituted. *Reed v. Hussey*, 525

18. An after action by a seaman, nominally *in rem*, but so inaptly shaped as to become, in effect, an action *in personam* against the agents or trustees of the owners, will not carry separate costs to either party. *id.*

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1. The Court, in estimating the amount of damages to be given for an assault and battery, will have regard as well to the conduct of the libellant as to that of the respondent. *Saunders v. Buckup*, 264
2. Where, in a libel for an assault and battery by a master, the mate, who was a witness of the transaction, but was in no way connected with it, was joined as a party to the suit with the master, the Court will presume that this was done to render the mate an incompetent witness, and will consider that fact in estimating damages. *id.*
3. The measure of damages, in an action by a seaman for being wrongfully discharged or left at an intermediate port, is governed by the equities of the case, and is usually the wages for the voyage, and an allowance for expenses, unless the seaman has been engaged in other profitable employment; and the burden is on the master to show such employment, and the amount earned therein, by way of abatement. *Farrell v. French*, 275
4. Where a libel is brought for the non-delivery of goods according to a bill of lading, the measure of damages is the current value of the goods at the port of destination at the time when the goods ought to have been delivered, with interest from that time. *The Gold Hunter*, 300
5. If a seaman is imprisoned on shore by a master, for misconduct, and is wrongfully left behind, he will, in an action *in rem* for his wages, be entitled to include in his claim the time he is thus imprisoned and detained, and his necessary disbursements during that time, and the value of his property which was left on board; but direct damages, by way of compensation, are not, under such circumstances, recoverable in a Court of Admiralty. *The Maria*, 331
6. Where, in the case of an unauthorized sale of a vessel by her master, in a foreign port, restitution of the vessel, or the amount of her value on her arrival home, is decreed to her former owner, the purchaser at such sale will be allowed the amount of the necessary repairs put upon the vessel to fit her for sea, and the expenses of navigating her home, and the price paid for her, on such sale, to the agent of the owner. *The Henry*, 465
7. The right to the freight earned upon the homeward voyage follows the ownership of the vessel. *id.*
8. The bills of lading are only *prima facie* evidence of the amount of cargo upon which freight is to be estimated. *id.*
9. Repairs and betterments put upon the vessel in her home port by the purchaser, before notice of the former owner's claim, will be allowed to the purchaser out of the proceeds of the vessel, if any remain after the other accounts are adjusted. *id.*

See ACTION, 2, 33, 84.
 COLLISION, 1, 3 to 5.
 SEAMAN'S WAGES, 21, 30.
 SHIP-MASTER, 7, 8.

DECREE

See PRACTICE, 4 to 6.
REHEARING, 1 to 3.

DELIVERY.

See SEAMEN'S WAGES, 12, 13.

DERELICT.

See SALVAGE, 11, 15, 18.

DESERTION.

1. A temporary and open absence from his vessel, by a seaman, without objection from the master, in an intermediate port, while the vessel is discharging or taking in her cargo, is not a desertion. *Borden v. Hiern*, 293

See SEAMEN'S WAGES, 4 to 7, 9 to 11, 16, 17, 31 to 33, 43 to 48.

DEVIATION.

See SEAMEN'S WAGES, 22.

DUTIES.

1. Goods saved from a wreck and brought within the United States, are subject to import duties, under the acts of Congress of April 20th, 1818, and March 1st, 1823. (3 *U. S. Stat. at Large*, 438, 729.) *The Waterloo*, 114
2. Whether they would be so at common law, *quere.* *id.*

See ACTION, 9.
SALVAGE, 13.

E

EVIDENCE

1. Testimony taken *ex parte* is to be received with the greatest caution. *American Ins. Co. v. Johnson*, 9

2. Seamen are competent witnesses for each other in suits for wages earned on the same voyage. *The Cypress*, 83

3. Parol evidence on the part of a seaman is admissible to vary or contradict the written contract contained in the shipping articles. *id.*

4. In a suit *in rem* for seamen's wages, the master is a competent witness for the libellant, though he may have executed a bill of sale of the vessel to the claimant. *The Trial*, 94

5. The testimony of the master in such a case is, in the absence of the shipping articles, sufficient of itself to establish the time of each seaman's service, and the amount of wages due. *id.*

6. In an action by seamen for compensation because of a short allowance of provisions, if the fact of short allowance is proved, the burden of proof is on the owner of the vessel, to show that she had on board the quantity of provisions required by statute. *The Elizabeth Frith*, 195

7. Parol proof offered by a ship-owner to vary the voyage described in the shipping articles, is not admissible in an action *in rem* by the seamen for their wages. *The Triton*, 282

8. The deposition of a master, who has interposed a claim and answer in an action *in rem*, and continues a party to the suit, cannot be read in evidence, on the part of the owners of the vessel. *The Exchange*, 366

9. In a suit for seamen's wages, the proctor for the libellant, though not legally incompetent as a witness for his client, has a bias which is to be regarded in weighing the credit to be given to his testimony. *Granon v. Hartshorne*, 454

10. Evidence of the receipt, by a special agent of the owner of a vessel, of the proceeds of an unauthorized sale of the vessel by her master, does not afford a presumption that the sale was ratified by the owner. *The Henry*, 465

11. Slight credit will be given to the unsupported evidence of a witness who testifies to admissions obtained by him from a party for the purpose of charging him thereby. *Sunday v. Gordon*, 569

See ACTION, 3, 4, 19.
ANSWER, 6.
COLLISION, 2.
DAMAGES, 3.
PRACTICE, 2, 10.
SEAMEN'S WAGES, 3, 5, 14, 25.
SHIP-MASTER, 10, 11, 15.
SHIPPING ARTICLES, 9.
USAGE, 2.

EXCEPTION.

See ANSWER, 3, 4.
PRACTICE, 8.

EXECUTION.

See FORFEITURE, 5 to 7.

F

FALSE IMPRISONMENT.

See ACTION, 24.

FEES.

1. If the State Court compensates services similar to those performed by a marshal, although not performed there by a like officer, the marshal is entitled to the same compensation. *The Trial*, 94
2. The same fees are allowed to officers in this Court, as in the Supreme Court of the State, without regard to the source of the power of the State Court—whether customary or statutory. *id.*
3. This Court allows a reasonable compensation to its officers for services not enumerated in the fee-bill. *id.*

FOREIGN ATTACHMENT.

See ATTACHMENT.

FOREIGN PORTS.

See HYPOTHECATION, 2.
LEX LOCI, 2.

FORFEITURE.

1. A *bona fide* purchaser of the whole interest in a vessel, subsequent to a forfeiture incurred under the 16th section of the Act of Congress of December 31st, 1793, (1 *U. S. Stat. at Large*, 295,) by the sale or transfer to an alien of an interest in an American registered vessel, is not within the proviso of that section. *The Florence*, 52
2. That proviso relates only to persons who are joint owners of a vessel at the time of the commission of the act which produces the forfeiture. *id.*
3. Such a purchase will not prevent the forfeiture. *id.*
4. The forfeiture takes place at the moment of sale or transfer to an alien, and any subsequent judgment of forfeiture relates back to that time. *id.*
5. The title of the alien purchaser, if he acquires any, is divested *eo instanti* by the statute, and he has left in him no interest which can be seized on execution. *id.*
6. A levy on the forfeited property, under an execution against the alien, previous to the prosecution of the forfeiture, will not prevent the forfeiture. *id.*
7. Whether previous possession by a State sheriff, under a *f. fa.* issued by a State Court, excludes the marshal from arresting and taking into his possession, under an attachment issued by this Court, a vessel forfeited for a breach of the laws of the United States, *quere.* *id.*
8. A forfeiture under the statute above cited does not avoid the lien of sea-

men and material men, existing at the time of forfeiture. *id.*

9. The acts of April 18th, 1818, and May 15th, 1820, (8 *U. S. Stat. at Large*, 432, 602,) which provide that the ports of the United States shall be closed against every British vessel coming from a port closed against vessels of the United States, and that every vessel so excluded, which shall enter a port of the United States, shall be forfeited, applies only to a voluntary entry by the act of the owner or master of the vessel, or of their agents. *The Waterloo*, 114

10. An entry by a derelict vessel, brought in by salvors, without the consent of her owner or master, or of their agents, does not work her forfeiture under those acts. *id.*

See SEAMEN'S WAGES, 4 to 7, 9 to 11, 16, 20, 22, 23, 31 to 33, 43 to 53.

FREIGHT.

See DAMAGES, 7, 8.
SEAMEN'S WAGES, 40, 42.
SHIPPING ARTICLES, 7.

G

GARNISHEE.

See ATTACHMENT, 3.

H

HYPOTHECATION.

1. A master can, in a foreign port, hypothecate his vessel for the payment, without maritime interest, of money advanced by a stranger for necessary repairs, and to secure the payment of a bill of exchange drawn by him on the owner of the vessel for those advances, although he is himself owner of cargo more than sufficient to pay for the repairs, and is solely concerned in interest in the voyage. *The William and Emmeline*, 66

2. Charleston (South Carolina) is, in respect to hypothecation, a foreign port to New-York. *id.*

3. Either the owner or the master of a ship may bind her by a direct hypothecation, for repairs or supplies made or furnished in a foreign port, although a note or other obligation is given for the demand. *The Hilariety*, 90

4. A hypothecation in the form of a mortgage is not a bottomry bond, where the creditor neither assumes the risk of a voyage nor reserves marine interest. *id.*

5. A hypothecation of a vessel in the form of a mortgage, as security for supplies furnished in a foreign port, may be enforced *in rem* in the Admiralty. *id.*

6. The lien created by such hypothecation is not lost by taking other security for the claim. *id.*

7. A master may hypothecate his vessel for necessities in a foreign port, unless he has at his command funds or credit of his owner. *The Gustavia*, 139

See ACTION, 4.
JURISDICTION, 16, 17.
SEAMEN'S WAGES, 2.

I

IMPRISONMENT.

See SEAMEN'S WAGES, 34, 35.

INTEREST.

1. In actions for seamen's wages, interest will, as a general rule, be allowed from the time the wages were due, until a tender or payment under the decree of the Court. *The Elizabeth Frith*, 195

2. Interest will be allowed only upon regular wages, and not upon extra wages recovered by way of compen-

sation for short allowance of provisions. *id.*

See DAMAGES, 4.

J

JOINDER OF ACTIONS.

1. Parties may join, in one libel, causes of action arising *ex contractu* and those arising *ex delicto*, where the causes of action are so united that the same evidence will apply to all—for example, in a suit *in personam*, a claim for wages, and a claim for damages for an assault and battery committed on the same voyage. *Borden v. Hiern*, 293
2. *Scmble*, that parties may join, in a suit *in personam*, causes of action arising *ex delicto* against two respondents, with those arising *ex contractu* against one of them, where the same evidence will apply to all—for example, a claim against a master and a mate, for damages for an assault and battery, and a claim against the master for wages earned on the same voyage. *id.*
3. Joinder of causes of action in Admiralty, considered. *id.*

JURISDICTION.

1. Admiralty Courts have jurisdiction equally *in personam* and *in rem*. *American Ins. Co. v. Johnson*, 9
2. When Admiralty jurisdiction has once attached, it is not divested by reason of any further acts done upon land in continuation of the maritime act which gave jurisdiction. *id.*
3. Admiralty jurisdiction, when administered under the restrictions of the English jurisprudence, is co-extensive with the ebbing and flowing of the tide. *id.*
4. The test of Admiralty jurisdiction is whether the transaction is of a maritime character. *id.*
5. A party deprived of his property on the high seas in any manner has, as

a general principle, his remedy in Admiralty. *id.*

6. Where a master was instructed, in his home port, to sell a cargo at the port of destination according to his judgment, and he landed the cargo there and proceeded to dispose of it on shore: *Held*, that this was not a maritime contract cognizable in an Admiralty Court. *Waterbury v. Myrick*, 34
7. Where a master, so employed, abandoned the sale of the cargo in order to effect a salvage service in a vessel procured by pledging the proceeds of the cargo: *Held*, that this was a breach of contract, for which no action lay in a Court of Admiralty. *id.*
8. Courts of Admiralty in this country are not limited in their jurisdiction by the rules of the common law. *The Stephen Allen*, 175
9. Materials furnished to a vessel in another State than that to which she belongs, create a lien which is enforced in Admiralty under the general maritime law. *id.*
10. For materials furnished a vessel in her home port, a lien is created, if at all, only under the State law, which lien is enforced, however, in the Admiralty Courts. *id.*
11. Courts of Admiralty in the United States have jurisdiction over claims for salvage upon waters within the ebb and flow of the tide, though within the body of a State. *The Wave*, 235
12. Courts of Admiralty have jurisdiction of suits for pilotage. *id.*
13. Whether Admiralty has jurisdiction over a personal tort committed on board a vessel in a harbor where the tide ebbs and flows, *quere*. *Borden v. Hiern*, 293
14. A contract, in order to be within the jurisdiction of Admiralty, must be one which is to be performed upon the sea, or which has relation to a maritime service. *The Perseverance*, 385

15. Where money was advanced to purchase a ship, and her bill of sale was deposited with the lender, by way of security, with a power of attorney to him to sell the ship for his reimbursement: *Held*, that such a contract was not cognizable in Admiralty. *id*

16. The party holding such bill of sale, acquired, by its delivery to him, no hypothecation of the vessel or interest in her, enabling him to maintain a petitory or possessory action. He took only a naked power to sell, which did not amount to a pledge *in presenti*. *id*

17. Admiralty cannot give relief by converting such contract into a hypothecation, nor does such contract carry with it any of the ingredients of a lien, either express or implied. *id*

See ACTION, 5 to 13, 18, 20, 21.
BILL OF LADING, 1,
PARTIES TO ACTIONS, 1, 2.
SURPLUS MONIES, 2, 3.

L

LEVY.

See FORFEITURE, 6, 7.

LEX LOCI.

1. In regard to supplies furnished a domestic ship in her own port, Courts of Admiralty are governed by the law of the place, in determining whether a lien against the vessel exists for such supplies. *The Hilary*, 99

2. For this purpose, ports in different States of the United States are foreign to each other. *id*

LIBEL.

See ACTION, 13.
AMENDMENT, 1.
COSTS, 2.
PARTIES TO ACTIONS, 1, 2.
PRACTICE, 19, 24.

LIEN.

1. Under the statute of New-York, (2 Rev. Stat. 493,) which gives a lien on a vessel where a debt of \$50 or upwards is contracted for materials furnished to her in her home port, a debt of \$49, which, by the accumulation of interest, exceeds \$50 at the time suit is brought upon it, is not a lien upon the vessel. *The Stephen Allen*, 175

2. A ship's broker has a lien on a foreign vessel, in the nature of the lien of a material man, for services in shipping a crew for the vessel, and for advances for their wages. *The Gustavia*, 189

3. But he has no lien on the vessel for services in drawing a contract between the owner of horses shipped as part of her cargo and hostlers who accompanied her to take care of the horses. *id*

4. *Seemle*, that it is not necessary for a material man to show that the supplies furnished to a vessel by him were actually necessary for her. If they were furnished at the request of her master, they create a lien on her, although they exceed her actual need, provided there was no *mala fides* or collusion on the part of the material man. *id*

5. A stevedore has no lien upon a vessel for his services in discharging her in port, and cannot sue *in rem* in Admiralty for his compensation. *The Amstel*, 215

6. Where a debt, which might otherwise have been a lien on a vessel, is contracted under an explicit agreement with the master individually, that affords evidence that the creditor has agreed to look only to the personal responsibility of the master, or, at most, of the owner, and that the vessel is exonerated from any lien. *id*

7. In a case of supplies furnished in New-York to a vessel owned in North Carolina, where more than two years had elapsed, and no demand of payment had been made of the master who contracted the debt, or of those

who owned the vessel when the debt was contracted, and the vessel had since made several voyages between New-York and North Carolina, and been sold at public auction to a *bona fide* purchaser without notice of the debt: *Held*, that the lien was lost. *The Utility*, 218

8. The owner of goods which are shipped and are not delivered according to the bill of lading, has a lien upon the vessel for the value of the goods, which may be enforced in Admiralty by an action *in rem*. *The Gold Hunter*, 300

9. The owner of cargo, part of which is sold by the master to raise money for the necessary repairs of the vessel, and part of which is consumed by the crew and passengers on the voyage, has a lien on the vessel for the value of what is so sold and consumed. *id*

10. It seems that the lien of a material man is assignable. *The Boston*, 309

11. Ordinarily, the lien of a material man will not be upheld beyond the termination of the voyage for which the supplies are furnished. *id*

12. Freighters, whose goods are disposed of at a foreign port to raise money for necessary repairs, have a lien upon the vessel for the value of the goods at the port of destination. *id*

See ACTION, 35, 36, 39, 40.

ATTACHMENT, 2, 4.

BOTTOMRY.

FORFEITURE, 8.

HYPOTHECATION.

JURISDICTION, 9, 10, 16, 17.

LEX LOCI, 1, 2.

SHIPPING ARTICLES, 5.

SURPLUS MONETS, 2, 3.

LIGHT-MONEY.

See MARSHALLING OF CLAIMS, 1.

M

MARSHAL.

See FEES, 1.

MARSHALLING OF CLAIMS.

1. In the disposition of the proceeds of a vessel, different claims are marshalled as follows: 1. Seamen suing for wages; 2. Material men; 3. A consignee, for money advanced for towage, pilotage, light-money and port duties—each claim carrying with it its own costs. *The Rodney*, 226

MASTER.

See SHIP-MASTER.

MATE.

1. In an action against a mate for an assault and battery, it is a sufficient justification, that he acted under the orders of the master, not knowing them to be illegal. *Sheridan v. Furber*, 423

See ACTION, 24.

DAMAGES, 2.

SEAMEN, 4, 5.

SEAMEN'S WAGES, 50, 51.

SHIP-MASTER, 7.

MATERIAL MEN.

See ACTION, 7.

ANSWER, 2.

FORFEITURE, 8.

JURISDICTION, 9, 10.

LEX LOCI, 1, 2.

LEX, 1 to 4, 7, 10, 11.

MARSHALLING OF CLAIMS, 1.

SEAMEN'S WAGES, 2, 19.

SURPLUS MONETS, 2.

MEDICINE CHEST.

See ANSWER, 6.

MINOR.

See ACTION, 32 to 34.

SHIP-MASTER, 17 to 19, 31.

MORTGAGE.

See HYPOTHECATION.

MUTINY.

See SEAMEN, 1.

SEAMEN'S WAGES, 34, 35.

P

PARTIES TO ACTIONS.

1. Parties whose interests rest upon a cause of action common to all, may unite in the same libel in Admiralty, though as between themselves their interests are separate and distinct. *American Ins. Co. v. Johnson*, 9
2. A libel *in personam*, resting upon a common cause of action, may be filed for the libellants and for all others interested, whenever the whole subject matter can be disposed of in one suit. *id.*

See COSTS, 17, 18.
PRACTICE, 22, 24.
SALVAGE, 4.
SEAMEN'S WAGES, 28.

PASSENGER.

See ACTION, 38.

PERIL OF THE SEA.

See BILL OF LADING, 2.

PILOT.

1. A pilot is under no legal obligation to take charge of a vessel in distress, unless her condition be such as to require pilotage services. *The Wave*, 235

See SALVAGE, 17.
SHIP-MASTER, 9.

PILOTAGE.

See MARSHALLING OF CLAIMS, 1.
PILOT.

PLEADING.

See ANSWER.
JOINER OF ACTIONS, 18.
PRACTICE, 8, 12, 15, 19 to 23.

PORT DUTIES.

See MARSHALLING OF CLAIMS, 1.

PRACTICE.

1. The clerk's report, in matters referred to him, should state facts and conclusions, and not detail the evidence at length. *The Trial*, 94
2. A neglect, at the trial, to object to the competency of evidence, is a waiver of the right to object to the same evidence on a subsequent reference to the clerk. *id.*
3. The practice of calling in seafaring men to assist the judgment of the Court, has never been sanctioned in this country. *The Waterloo*, 114
4. The regular method of proceeding against a surety in a stipulation for costs in a suit in Admiralty, is by petition, after notice to the surety. *The Baltic*, 149
5. In such a case, the decree may be final and peremptory. *id.*
6. Upon a proceeding by motion, after a personal demand of the costs from the surety, a conditional decree only will be awarded. *id.*
7. The Court will not allow its recollections or impressions of verbal consents and understandings between counsel, not entered in its minutes, to interfere with or control the rights of parties. *The Martha*, 151
8. An exception for irrelevancy taken to a pleading which is not irrelevant, but is only insufficient, will be overruled. *The Elizabeth Frick*, 195
9. Where, in a suit *in rem* for wages, an answer is filed to the merits, and issue is joined, and the case is brought to a hearing, and proofs are taken on both sides, that is a waiver by the claimant of any right of exception to the regularity of the proceedings of the libellant as to the time of instituting his suit, under the 6th section of the act of July 20th, 1790. (1 U. S. Stat. at Large, 181, 183.) *The Edward*, 286
10. Where, in a suit *in personam* for wages, the answer alleged, by way of set-off, payment of a board bill during the absence of the libellant

- from the vessel, and the evidence offered raised a strong presumption that such payment had been made: *Held*, that if the libellant would not admit the payment, the respondent might, on filing an affidavit that such payment had been made at the libellant's request, have time to procure proof thereof, and to sue out a commission or a *dedimus potestatem* for that purpose. *Ingraham v. Albee*, 289
11. An objection to the competency of an administrator to appear as claimant in a suit *in rem*, must be taken on his appearance, and before sale of the property and payment of the proceeds into Court. *The Boston*, 309
12. In Admiralty practice, in the absence of any specific rule regulating the proceeding, a replication is necessary to put in issue the facts set up by a sworn answer. *The Mary Jane*, 390
13. If no replication is filed, the libellant will be taken to have admitted the truth of the answer. *id.*
14. The method of procedure in the English Admiralty, in matters of practice, and its origin and forms, considered. *id.*
15. New rule promulgated in regard to replications. *id.*
16. A notice by the proctor for the libellant, to the respondent personally, in an action for a personal tort, that, in case of a compromise out of Court, he will be held liable for the costs, does not vary the relative rights of the parties, and need not be regarded. *Peterson v. Watson*, 487
17. *Semble*, That the proper notice in such case would be, that the respondent pay to the proctor for the libellant the amount of the compromise money. *id.*
18. Where a suit is compromised without satisfying a proctor's costs, and he desires to prosecute it to recover his costs, the regular practice is to notice the cause for trial, and give notice to the opposite party that the suit is continued to recover costs and nothing more. *id.*
19. Where a supplemental libel is filed before the process is returnable, it becomes part of the pleadings, without further notice to the respondent, and he is bound to answer it. *Thomas v. Gray*, 493
20. When the respondent has been arrested in a suit *in personam*, the answer is not filed, within the meaning of the 18th rule, until bail is perfected. *id.*
21. Where a replication is not filed within the time required by the rules of Court, the respondent will be held to have waived the benefit of the rules in that respect, unless he takes advantage of the point when evidence is offered at the hearing. *id.*
22. The non-joinder of proper respondents in an action *in personam* can be taken advantage of only by plea in abatement. *Read v. Hussey*, 525
23. The practice of Courts of Admiralty admits matter of abatement to be set up in the answer, but the answer must, in such case, demand the same judgment, and be subject to the same rules, as if a formal dilatory plea had been employed. *id.*
24. A person who, from incapacity of mind or other cause, cannot be made to understand the English language, cannot be a party to a sworn libel. He should sue under the guardianship of a committee, a *prochein ami*, or a trustee. *Sunday v. Gordon*, 569
- See* ADMINISTRATOR, 1.
 AMENDMENT, 1.
 ANSWER, 1, 2.
 COSTS, 2, 9.
 PARTIES TO ACTIONS, 1, 2.
 REHEARING.
 SURPLUS MONEYS, 4.
- PROCEEDS.
- See* MARSHALLING OF CLAIMS, 1.
- PROCESS.
- See* ATTACHMENT, 1

PROVISIONS.

See ANSWER, 4.
EVIDENCE, 6.
SEAMEN'S WAGES, 19.
SHIP-MASTER, 2.

R

REFERENCE.

See PRACTICE, 1, 2.

REHEARING.

1. A Court of Admiralty will not, except with the free consent of all the parties to be affected, grant a rehearing, or modify its definitive decree, after the term in which the decree is rendered. If the Court has the power to do so, such a practice has not been adopted. *The Martha*, 151
2. A decree made on a rehearing without such consent, modifying a final decree made at a previous term, was held to be a nullity. *id.*
3. *Seemle*, that a consent to a rehearing by the parties to a suit, will not affect the rights of a surety in a stipulation for costs, who has been discharged by a previous final decree. *id.*

REPAIRS.

See DAMAGES, 6, 9.

REPLICATION.

See PRACTICE, 12, 13, 15, 21.

REPORT.

See PRACTICE, 1.

S

SALE.

See DAMAGES, 6 to 9.
EVIDENCE, 10.
FORFEITURE, 1 to 6.
SHIP-MASTER, 10 to 16.

SALVAGE.

1. A salvor forfeits all claim to salvage by neglecting to inform the salvaged vessel beforehand of an imminent and secret danger known to him, and against which he is able to warn her. *American Ins. Co. v. Johnson*, 9
2. But he may be entitled to a compensation for services performed, although his conduct has been such as to forfeit all claims to a salvage remuneration. *id.*
3. An action will lie *in rem*, to recover a salvage compensation against the proceeds of salvaged property converted into specie, provided the same action would lie against the property itself. *Waterbury v. Myrick*, 34
4. The owner of a vessel which is employed in a salvage service may recover compensation for such employment out of the salvaged property, either as a co-salvor, by uniting with the officers and crew of the salvaging vessel in the suit, or by bringing it himself in his own right, in case they refuse or neglect to join. *id.*
5. An action *in personam* will lie by one salvor against a co-salvor, to recover a proportionate share of the salvage compensation, when the whole is received by the latter, and he withholds the share of the former. *id.*
6. An action *in rem* will not lie against money earned by a ship-master and supercargo as salvor, whilst in the general employ of the libellant as owner of the vessel and cargo. *id.*
7. The owner of a salvaging vessel is admitted to share in the salvage reward solely on the ground of the risk and damage to which his property is or may be subjected, and consequently he can come in as a co-salvor only where his vessel has been the direct means of rendering the service for which salvage is awarded. *id.*
8. Where a ship-master did not use the vessel of the libellant, but pledged funds belonging to the libellant and

- others, to procure another vessel in which the salvage service was effected: *Held*, that the libellant could not proceed *in rem* against the salvage money as a co-salvor. *id.*
9. Where, in an action *in rem* by an owner of a vessel, to recover a share of the salvage money earned by the master in saving a cargo of a wrecked vessel, it appeared that the cargo was saved, not from the vessel wrecked, but from an island on which it had been landed by her passengers, and that the salvage was not awarded by a competent Court, and there was no evidence to show the principles or rates on which it was adjusted: *Held*, that the libellant was not entitled to proceed *in rem* as a co-salvor. *id.*
10. The nature of salvage considered, and the principles regulating its amount enumerated. *The Waterloo*, 114
11. The rate of salvage in cases of derelict is seldom more than one-half of the nett proceeds of the property saved. Two-thirds of the whole proceeds have sometimes been allowed, but the whole proceeds are never allowed unless their amount is so small that less would be an inadequate compensation. *id.*
12. In awarding salvage upon a foreign vessel, Courts in this country will regard the rates of allowance in the Courts of the owner's country. *id.*
13. Import duties upon wrecked property are to be paid out of the gross proceeds, before deducting salvage, and are not to be charged exclusively on the owner's share of the salvage. *id.*
14. The relative claims of the actual salvors, and of the owners of the salving vessel and of its cargo, considered. *id.*
15. The duties of a master and of his crew in relation to saving derelict property, considered. *id.*
16. In this case, two-thirds of the proceeds of the property saved, after deducting the import duties, was given to the salvors. Two-thirds of the salvage was awarded to the owners of the salving vessel and of its cargo, and the remaining one-third was divided equally among the salvors, the master receiving no more than was received by each of the crew, and by a passenger who did duty as a sailor. Costs were decreed out of the proceeds in Court, after deducting salvage. *id.*
17. If a pilot goes beyond the duty imposed upon him by law, and renders meritorious services to a vessel in distress, he becomes a salvor, and may sue in Admiralty for salvage, though the service be performed upon pilotage ground. *The Wave*, 235
18. In a case of derelict, where there are no peculiar circumstances, Courts of Admiralty award a moiety as salvage. *The Galaxy*, 270
19. In distributing the salvage money, in a case where the salving vessel was exposed to no extraordinary risk or unnecessary deviation from her voyage, and where the salvage amounted to less than \$2,000, one-fourth was awarded to the owners of the salving vessel, and the remaining three-fourths were divided among her master and crew—the master receiving four shares, the mate two shares, and seven seamen, including the cook, one share each. *id.*
- See ACTION*, 1, 2.
JURISDICTION, 11.
PILOT, 1.
SEAMEN'S WAGES, 40 to 42.
- SEAMEN.**
1. A single act of insubordination on the part of a seaman, particularly if it be only a refusal to give himself up to be imprisoned, cannot be considered as mutinous, or as justifying the imprisonment itself. *Gardner v. Bibbins*, 356
2. A master may displace a mariner, and allot him other services than those for which he shipped, in case of his incapacity, or because the health or safety of the ship's compa-

- ny requires the change. *The Exchange*, 866
3. An express promise by a sick seaman to pay the amount of a physician's bill, for attendance upon him on ship-board in a foreign port, is without consideration and void. *Freeman v. Baker*, 372
 4. A ship's carpenter ranks with an ordinary seaman, and cannot disobey the orders of the second mate. *Sheridan v. Furbur*, 428
 5. General orders from one officer will not excuse the disobedience of a seaman to the specific orders of another officer. *id.*
 6. It is a matter of public policy to encourage youths of cultivated minds and respectability of character and position to enter the merchant marine as seamen. *Gould v. Christianson*, 507
- See ACTION, 5, 6, 10, 14, 15, 17, 18, 24, 25, 28, 29, 38.
 ANSWER, 6.
 ASSAULT AND BATTERY, 1.
 COSTS, 17, 18.
 DESERTION, 1.
 EVIDENCE, 2 to 6.
 FORFEITURE, 8.
 SALVAGE, 15, 16, 19.
 SEAMEN'S WAGES.
 SHIP-MASTER, 1, 2, 5, 6, 17 to 21.
 SHIPPING ARTICLES.
- SEAMEN'S WAGES.
1. As soon as a seaman's connection with a vessel is legally dissolved, his right to resort to her *eo instanti* for his wages is consummated. *The Cypress*, 88
 2. Seamen's wages take precedence of a hypothecation for supplies. *The Hilarity*, 90
 3. The right of a seaman to his wages depends on the service, and not on the shipping articles, and he is not obliged to call for them in order to establish his claim to wages, though he may do so. *The Trial*, 94
 4. The 5th section of the act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 138,) designates the only case in which a forfeiture of his wages by a seaman is peremptory, and is the only decree which the Court can render. *The Cadmus*, 139
 5. What is a sufficient entry in the log-book to prove the desertion which works such forfeiture. *id.*
 6. Where the only defence set up to a libel for wages is the desertion of the libellant, the Court will not award a sum less than that due, because of misconduct not amounting to desertion. *id.*
 7. Where the defence is to the entirety of wages, because of criminal misconduct by the seaman, no ground is thereby afforded for claiming a diminution of wages, or an equitable set-off. *id.*
 8. Where a seaman ships for a certain time, a discharge by the master, actual or constructive, entitles the seaman to sue for wages at once, though the stipulated time of service has not expired. *id.*
 9. The act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 131,) makes desertion, carrying with it a forfeiture of wages, a statutory offence, and defines the evidence by which it is to be established. *The Martha*, 151
 10. There can be no desertion after the voyage is ended. *id.*
 11. The voyage is ended when the vessel is safely moored at her last port of discharge. *id.*
 12. Fifteen days will be taken to be a reasonable time for a vessel to unload in ordinary cases, and where, for wages due on the delivery of the cargo, a vessel was arrested on the fourteenth day after she was moored in her port of discharge, the suit was discharged as prematurely brought. *id.*
 13. There is no distinction between what is necessary to constitute the delivery of a cargo where it is owned by a freighter, and where both ship

- and cargo belong to the same person. *id.*
14. The mere offer of a master to pay a seaman's wages is not necessarily an admission that the wages are due and payable. *id.*
15. Where a seaman is unlawfully discharged during a voyage, or is compelled, by the cruelty of the mates, to leave the vessel, from a regard to his personal safety, he is entitled to full wages for the entire voyage. *The America*, 185
16. Whether an unauthorized absence of a sailor from his ship in her home port, after the voyage is terminated in a nautical sense, but before he is entitled to demand his discharge, is a desertion which works a forfeiture of his wages, *quere. The Elizabeth Frith*, 195
17. Facts and circumstances considered, which were held to have constituted an authorized absence of seamen from their vessel, and not a wilful desertion. *id.*
18. In a case of disobedience by a seaman to the master, his wages for one-half of a month were deducted by the Court from his pay, and, in a case of insolence, wages for one month were deducted, as mulcts for misconduct. *id.*
19. Where a mate had on board his vessel a private adventure, consisting of provisions, which were used for the necessary support of himself and of the crew: *Held*, that he was entitled to recover, as enhanced wages, the value of the part consumed for his own support, and to be allowed, out of a surplus in Court, the value of the supplies beyond his own support. *The Rodney*, 226
20. A master who receives back into his service a seaman who has deserted, will be held to have waived the forfeiture of the seaman's wages. *Ingraham v. Albee*, 289
21. An allowance may, in such a case, be decreed to the owner, for the time of the seaman's absence. *id.*
22. *Semble*, that a deviation from the voyage named in the shipping articles excuses a seaman for leaving the vessel, and bars the charge of forfeiture of wages. *id.*
23. Misconduct in a seaman will not be punished by an absolute forfeiture of his wages and of his effects on board, unless it be continued or repeated, or, if occurring but once, be of a highly aggravated character. *The Maria*, 331
24. If the voyage mentioned in the shipping articles is broken up without cause, and without the seaman's consent, he may recover wages for the whole voyage stipulated, deducting his earnings meanwhile. *id.*
25. Where no wages are stipulated in the shipping articles, a seaman may either prove, by parol evidence, what wages were agreed to be given, or may, under the statute, (*Act of July 20th, 1790, § 1, 1 U. S. Stat. at Large, 131.*) claim the highest rate payable at the port of shipment within the three months next preceding the date of the articles. *The Warrington*, 335
26. Where an American vessel is condemned as unseaworthy, and is voluntarily sold in a foreign country on that account, and the voyage is relinquished, and the seamen are paid their wages only up to the time of the sale, they are entitled to two months' extra wages, under the 3d section of the act of February 28th, 1803, (*2 U. S. Stat. at Large, 203.*) *Wells v. Meldrum*, 342
27. Whether the same rule would hold in the case of a sale of a vessel *in invitum*, as, by compulsory sale for the violation of a penal law, or where the sale was rendered necessary by disasters at sea, *quere. id.*
28. Where the two months' wages are due, and have not been paid to the foreign consul, as provided by the act, the seamen may recover them in an action against the master in their own names. *id.*
29. Compensation may be allowed a mariner for extra services, different

- from those agreed to be rendered, and carrying a higher rate of wages—as, for example, those of a caulker. *The Exchange*, 366
30. The measure of compensation is the difference between the two rates of wages, for the time employed in the extra services. *id.*
31. A seaman who goes ashore, without the intention of deserting, to apply to an American consul for redress for alleged cruel treatment on board, leaves the vessel for reasonable cause, and does not incur a forfeiture of wages. *Freeman v. Baker*, 372
32. If a seaman who absents himself from his vessel is afterwards forcibly brought back, and returns to his duty, that is a condonation of his offence and a remission of the forfeiture of his wages; and a stipulation in the shipping articles that it shall not have such effect, will be held to be void. *id.*
33. A stipulation in the shipping articles not to sue for wages until the vessel is unladen, is not an extension of the voyage; and, if a seaman leaves her, without permission, after she is moored, but before her unlivery, that is not a desertion which works a forfeiture of wages under the act of July 20th, 1790, (1 U. S. Stat. at Large, 131, 133.) *Granon v. Hartshorne*, 454
34. Where a seaman, before his period of service is ended, is imprisoned by the local authorities in a home port, on a well-founded charge of mutinous conduct, the master is not liable for the seaman's wages which accrue during the time of his imprisonment. *Thomas v. Gray*, 493
35. Such imprisonment may, however, be deemed an adequate punishment for the offence, and prevent a subtraction of the wages earned prior to the imprisonment. *id.*
36. Agreements by which seamen are to receive for their services a share of the profits of the voyage, are not partnerships, but contracts of hiring, and the shares so agreed upon are wages, and are recoverable as such; and this is so whether the compensation is to be made in kind or in money. *Reed v. Hussey*, 525
37. Under shipping articles for a fishing voyage, which give to the seamen shares of all that shall be obtained during the voyage, to be received by them as soon after the arrival of the ship in her home port as the voyage can be made up, they become entitled to shares only in so much cargo as is brought safely to the home port. *id.*
38. If, under such articles, part of the cargo be lost on the voyage home, the seamen are entitled to receive their proportions only out of the residue which arrives home in safety, and not out of the original cargo. *id.*
39. The maritime law does not render the ship-owner, in any sense, an insurer for the safe delivery of such cargo; and the seamen's wages, if consisting of a share of the cargo, must depend upon the successful termination of the voyage. *id.*
40. Where goods are saved and brought into the port of destination by salvors, the ship-owner is not entitled to freight on such goods; nor can the seamen recover wages, as such, though the salvage be effected in part by their services. *id.*
41. If a seaman does not claim wages in such case, but claims a proportion of the cargo, as quasi owner of it, that interest may be equitably secured to him, subject to the proper charges for salvage and transportation; or, having participated in the salvage service, he may, as salvor, claim a part of the cargo proportioned to the value of his wages. *id.*
42. Where seamen contract to be paid by a share of the freight or of the proceeds of a voyage, they cannot, in case of wreck, claim compensation for salvage services, or more than day wages for the time actually employed in saving the wreck. *id.*
43. Under the maritime law, there can be no desertion by a seaman, working a forfeiture of wages, unless there is an abandonment of the ship and of

- her service, with an intent not to return. *The Union*, 545
44. The act of Congress of July 20th, 1790, (1 *U. S. Stat. at Large*, 181,) varies that qualification of the offence, supplies a new definition of it, prescribes the manner in which it must be proved, and fixes an inflexible punishment. *id.*
45. Under the maritime law, Courts of Admiralty could mollify the penalty of absence without leave, and of desertion, and could do so upon evidence mitigating the offence or showing the repentance of the deserter, at any reasonable time after the offence. *id.*
46. The statute inflicts an absolute forfeiture of wages in both cases. *id.*
47. The construction of the statute considered. *id.*
48. The mode of proof appointed by the statute must be strictly followed in all particulars. *id.*
49. A seaman has, under the statute, forty-eight hours to return to his vessel, after having absented himself from her without leave, and does not incur a forfeiture of wages if the vessel departs from the place before the expiration of the forty-eight hours. *id.*
50. If a seaman has permission from the second mate to go on shore, and acts in confidence upon such permission, he is not absent without leave from the commanding officer, although the chief mate or master is, at the time, on board. *id.*
51. Such permission to go ashore may be implied from the acquiescence or silence of the officers in command, or of the master on shore. *id.*
52. Where a seaman goes ashore temporarily, intending to return immediately, and makes all reasonable efforts to do so, if the master, knowing that he is on shore, prevents his reaching the ship, and the seaman is thus left in a foreign port, he is entitled to recover full wages for the voyage. *id.*
53. He can also recover the value of his wearing apparel and effects left on board the ship, and taken away in her and not restored to him. *id.*
- See* ACTION, 8, 10, 14, 20 to 28, 25 to 28.
 COSTS, 3, 5, 6 to 9, 11 to 14, 16.
 DAMAGES, 5.
 EVIDENCE, 4, 5, 9.
 INTEREST, 1, 2.
 JOINDER OF ACTIONS, 1, 2.
 MARSHALLING OF CLAIMS, 1.
 SHIPPING ARTICLES, 1, 2, 6, 8, 9.
 SURPLUS MONIES, 1, 4.
 USAGE, 2.
- SETTLEMENT.
- See* COSTS, 7 to 9, 11 to 14.
- SHIP-BROKER.
- See* LIEN, 2, 3.
- SHIP-MASTER.
1. If a master degrades a cook for incompetency or misconduct, his decision will, in ordinary cases, be considered as final. *The Elizabeth Frith*, 195
 2. It is the duty of a master to see personally that his crew are provided with a sufficient quantity of provisions. *id.*
 3. In this country, no formalities are necessary to the due appointment of a ship-master. The registry acts of the United States in regard to vessels and their masters, are only designed for the protection of the revenue, and do not affect the validity of a master's authority. *The Boston*, 309
 4. Where, upon the death of the master and sole owner of a ship during a voyage, the mate took command, and his name was substituted in the ship's register for that of the former master, and he navigated her for a year, without objection, and with the knowledge of the widow and children and agent of the former master: *Held*, that his acts done in the capacity of master were valid as

- against the representative of the deceased owner. *id.*
5. If a master causes a seaman to be imprisoned on shore for misconduct, he ought, before leaving port, to ascertain if the seaman is willing to return to his duty. *The Maria*, 381
6. Where a seaman openly manifests insubordination, it is the duty of the master to apply such correction as may be required to subdue him; and, if there does not appear to have been any cruelty or needless severity, the Court will not undertake to measure the degree of punishment which was necessary. *Gardner v. Bibbins*, 356
7. Where a carpenter disobeyed the orders of the second mate, on an occasion of no pressing emergency, under the erroneous impression that he was warranted in so doing, and the master had him flogged, without hearing the excuse which he offered: *Held*, that the master was liable in damages. *Sheridan v. Furbur*, 428
8. In measuring the amount of such damages, the Court will regard the motives of the libellant in instituting the suit. *id.*
9. The master or pilot in command of a vessel is only bound to exercise ordinary skill and prudence in getting his vessel under weigh. *The Eliza and Abby*, 435
10. A sale of a vessel by a master, *virtute officii*, for the benefit of all concerned, is not conclusive, but may be reviewed in Admiralty, and the burden of proof will be on the purchaser to show, as against the former owner, that the sale was both *bona fide* and necessary. *The Henry*, 465
11. The meaning of the term *necessary*, examined. *id.*
12. It seems that, in respect to the validity of such a sale by the master, the rule is the same, whether the question arises between the owner and the purchaser, or between the insured and the underwriter. *id.*
13. A survey of the vessel, under oath, prior to the sale, if not indispensable, is highly important as evidence to show the necessity and good faith of the sale. *id.*
14. A paper purporting to be a survey, but not drawn up, subscribed or sworn to prior to the sale, will not be received as evidence of a survey. *id.*
15. The facility with which a stranded vessel was reclaimed by the purchaser, after the sale of her by her master, is evidence in regard to the good faith of the master and the necessity of the sale. *id.*
16. The mere presence of an agent of the owner of the vessel, at the sale of her by her master, does not constitute the sale any the less a sale by the master. *id.*
17. A minor, who is placed by his father in a ship for an experimental voyage to improve his health, and to learn navigation and the duties of a seaman, and who signs the shipping articles as a boy, is subject to the rules and discipline of the ship. *Gould v. Christianson*, 507
18. The master, in the exercise of a reasonable discretion, may rightfully inflict corporal punishment on such minor. *id.*
19. No distinction, in this respect, exists in law, between common sailors and young men of education and refinement and of gentle bringing up. *id.*
20. Discipline on ship-board should, in all cases, be carried out, if it is practicable, by suasion and reasoning addressed to the men; and masters can employ force only when it is manifestly necessary. *id.*
21. This principle is most strictly obligatory in respect to boys who are known to the master to labor under physical infirmity, or to have been delicately brought up, or to possess talents and acquirements and to have entered the service to qualify themselves for the profession. *id.*

See ACTION, 17, 24, 32 to 34, 37, 40.
 ANSWER, 6.
 ASSAULT AND BATTERY, 1.
 BOTTOMRY, 2.
 DAMAGES, 6 to 9.
 EVIDENCE, 4, 5, 8, 10.
 HYPOTHECATION, 1, 3, 7.
 JOINDER OF ACTIONS, 2.
 JURISDICTION, 6, 7.
 MATE, 1.
 SALVAGE, 6, 8, 9, 15, 16, 19.
 SEAMEN, 2, 5.
 SEAMEN'S WAGES, 14, 20, 34, 35, 50
 to 53.
 SHIPPING ARTICLES, 3.
 SURPLUS MONIES, 1, 4.

SHIPPING ARTICLES.

1. A stipulation in shipping articles that the seamen shall not in any case demand their wages until the expiration of a certain time, is void, in case the service is completed or the seamen are discharged before the expiration of that time. *The Cypress*, 88
2. *Semble*, that an agreement in shipping articles that the seamen shall not sue for their wages till three months after their services are ended, will be held void as against the seamen. *id.*
3. Whether the master can vary the contract contained in the shipping articles, except by proof of deceit or fraud on the part of the seamen, *quere*. *The Exchange*, 366
4. Courts of Admiralty will not enforce against seamen stipulations in shipping articles which operate to their disadvantage, and are inserted in the articles in addition to the stipulations recognised by the act of July 20th, 1790, (1 *U. S. Stat. at Large*, 131,) unless it appears, from evidence outside the articles, that the seamen fully understood the stipulations and received an adequate consideration therefor. *The Sarah Jane*, 401
5. A stipulation, that the seamen will prosecute their suits for wages in Courts of common law only, amounts to a waiver of their lien upon the vessel, and is void, without it be proved that the matter was clearly explained to them before they en-

tered into the stipulation, and that no prejudice to their rights would be incurred by them therefrom. *id.*

6. Under a stipulation that all *differences* between the master or owners and the crew shall be referred to arbitration: *Held*, that where the wages due were agreed upon and demanded, but payment of them was refused, there was no *difference*, within the meaning of the stipulation. *id.*
7. Under an agreement, in regard to a sealing voyage, for shares of every article "procured by the crew," seamen cannot recover a share of freight earned by the transportation of merchandise. *id.*
8. A stipulation in the shipping articles, that the seamen shall not sue for wages until the vessel is unladen, is binding upon them, if it is fairly made. *Granon v. Hartshorne*, 454
9. Under such a stipulation, the libellant, in a suit for wages, has the burden of proving that the vessel was actually unladen when the libel was filed, or had then been moored fifteen days. *id.*

See SEAMEN'S WAGES, 3, 32, 33, 36 to 39, 42.

STALE CLAIM.

1. When a claim becomes stale in the Admiralty, considered. *The Utility*, 218

See ACTION, 16.

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plies, 175

STEVEDORE.

See LIEN, 5.

SURETY.

See PRACTICE, 4 to 6,
REHEARING, 3.

SURPLUS MONEYS.

1. After the liens upon a libelled vessel are satisfied out of the proceeds of her sale, the surplus funds remaining in Court are subject, as against the owner, to the master's claim for wages and for disbursements on account of the vessel up to the time of her seizure, but not for wages or disbursements after the time of her seizure. *The Santa Anna*, 79
2. A right of action *in rem*, by a material man, for supplies furnished a vessel in her home port, which is lost by a neglect to prosecute within the time limited by the statute, may still be enforced against the surplus proceeds of the vessel in Court. *The Stephen Allen*, 175
3. This right to proceed against such surplus proceeds holds good where a party has a right to proceed in Admiralty *in personam*, though not *in rem*, on the ground that the Court has jurisdiction of the parties, and that the subject or fund is already under its control. *id.*
4. So a master, who has a right to sue *in personam* for wages, may proceed by summary petition against such surplus proceeds. *id.*
5. Parties who could not sustain an original action *in rem*, may, some times, on petition, be paid out of "

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surplus remaining in Court. *The Boston*, 309

6. This is usually done in cases where the fund would otherwise be paid over to a foreign owner, and domestic creditors would be left to a merely personal remedy, against such owner, before a foreign tribunal. *id.*

See DAMAGES, 9.
SEAMEN'S WAGES, 19.

SURVEY.

See SHIP-MASTER, 13, 14.

T

TOWAGE.

See MARSHALLING OF CLAIMS, 1.

U

USAGE.

1. A usage, with coasting vessels, to run, under certain circumstances, without a watch on deck, is nugatory, and will be wholly disregarded. *The Rebecca*, 347
2. Evidence of a usage to receive natives, in Africa, temporarily on board of a vessel, and to leave them at convenient ports in the course of the voyage, leaving them for their services at the discretion of the master, is admissible to determine the extent of the liability of the owner of a vessel, when sued for wages by such a native employed on board the vessel. *Sunday v. Gordon*, 569

V

VOYAGE.

1. The voyage ends when the vessel is

safely moored at her port of final
destination. *Granon v. Hartshorne*,
454

W

WAGES.

See SEAMEN'S WAGES.

WAIVER.

See PRACTICE, 9, 21.

WITNESS.

See EVIDENCE.





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